SUPREME COURT OF QUEENSLAND

CITATION:	*Barker v Linklater & Anor* [2007] QCA 363
PARTIES:	**DOROTHY JUNE BARKER** (plaintiff/appellant) **v** **ANN-MARGARET LINKLATER** (first defendant/first respondent) **KATHERINE ELIZABETH HANNA** (second defendant/second respondent)
FILE NO/S:	Appeal No 5537 of 2007 SC No 1002 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2007
JUDGES:	Jerrard and Muir JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – DEFENCE AND COUNTERCLAIM – where appellant claimed to be in a de facto relationship with the deceased – where appellant claimed that the respondent daughters held their interest in the property on a constructive or resulting trust for the appellant – whether the primary judge erred in reversing her ruling that allegations in the defence where deemed admissions – construction of rule 166 of the *Uniform Civil Procedure Rules* – whether retrial should be ordered EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TERMS – CONSTRUCTIVE TRUSTS-INDEPENDANT OF INTENTION – GENERAL PRINCIPLES – where appellant claimed to be in a de facto relationship with the deceased – where appellant claimed that the respondent daughters held their interest in the property on

a constructive or resulting trust for the appellant – whether constructive or resulting trust arose – circumstances in which constructive trust arises

Acts Interpretation Act 1954 (Qld), s 32DA(2)
Succession Act 1981(Qld) , s 5AA, s 41
Uniform Civil Procedure Rules 1999 (Qld), r 5, 165(4), r 166, r 366, r 367

Baumgartner v Baumgartner (1987) 164 CLR 137, applied
Bryson v Bryant (1992) 29 NSWLR 188, cited
Carpenter v Carpenter Grazing Co Ltd (1987) 5 ACLC 506, cited
Cropper v Smith (1884) 26 Ch D 700, applied
Devries v Australian National Railways Commission (1992) 177 CLR 472, cited
Dunne v Turner [1996] QCA 272; CA No 196 of 1995, 20 August 1996, applied
Fox v Percy (2003) 214 CLR 118, applied
Green v Green (1989) 17 NSWLR 343, cited
Hayward v Giordani [1983] NZLR 140, cited
Popovic v Tanasijevic (No 5) [2000] 34 ACSR 1, cited
Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146, cited
Muschinski v Dodds (1984) 160 CLR 583, applied

COUNSEL: D Kelly for the appellant
D R Murphy SC for the respondents

SOLICITORS: Biggs Fitzgerald Pike for the appellant
McCullough Robertson for the respondents

[1] **JERRARD JA**: In this appeal I have read the reasons for judgment prepared by Muir JA, and agree with those and the order he proposes. I adopt his description of the relevant events and legislation, and add my own reasons.

The *Succession Act* proceeding

[2] The appellant's originating application under s 41 of the *Succession Act 1981* (Qld) dated 29 July 2004, and filed in this Court, sought not only orders for provision out of the estate of the deceased for the proper maintenance and support of the appellant, but also a declaration that the last Will and Testament of the deceased, dated 2 December 2003, was invalid for reason of the testator's incapacity; and in the alternative sought orders that the respondent Ann-Margaret Linklater be removed as personal representative of the estate of the deceased, that the respondent apply for probate of the deceased's Will, and that the Public Trustee be appointed as executor or trustee. Those other applications were abandoned in an amended application filed on 13 August 2004.

[3] That amended application continued to ask for orders for provision out of the deceased's estate for the proper maintenance and support of the appellant, and for costs. That application had the Registry No BS 6604/04, and Ann-Margaret Linklater, the executrix of the deceased's Will, was the only respondent. An extensive body of affidavit material was filled in BS 6604/04 and when that matter was called on, on 15 November 2006, Mr D Murphy SC, counsel for the respondent executor, asked that the affidavit evidence on that application be taken also as the affidavit evidence in the claim (which had the Registry No BS 1002/06) filed on 7 February 2006, for a declaration of either a constructive or resulting trust. The respondents to that claim for a declaration were the deceased's daughters, Ann-Margaret Linklater (her executor and trustee) and Katherine Elizabeth Hanna. Those two daughters were the only two residual beneficiaries of the deceased's estate.

[4] The claim in 1002/06 had progressed by way of pleading, rather than affidavit, but the affidavit evidence in the claim under the *Succession Act* covered much of the same ground as the pleadings in the claim for a declaration of a constructive or resulting trust. The common matters dealt with were essential to the appellant's success in both proceedings, namely the past history (and the nature) of the relationship between the appellant and the deceased. Accordingly, subject to some matter of admissibility, the appellant's counsel, Mr D J Kelly, raised no objection to the affidavit evidence on the application for orders under the *Succession Act* being taken as the affidavit evidence in the claim for a declaration of a trust. Various of the affidavit deponents were then cross-examined on those affidavits, and the appellant's counsel led evidence-in-chief from the appellant about her relationship with the deceased, a critical issue in both the proceedings she brought.

[5] Because both proceedings required that the adjudicating court determine the nature of the appellant's relationship with the deceased, the affidavit evidence filed in the *Succession Act* application covered very much the same field as the pleadings in the claim for a declaration, and likewise the evidence-in-chief of the appellant before the learned judge. The appellant was cross-examined, and the generally similar content of her affidavit, pleadings, and oral evidence-in-chief meant that cross-examination challenging the accuracy of her description of that relationship both was detailed, and also touched on matters described in her affidavit material, pleadings and oral evidence.

The objection to cross-examination

[6] The fact that the proceedings on the claim for declarations had proceeded by pleadings gave rise to an objection during that cross-examination, by the appellant's counsel, on the ground that the respondent defendants, in paragraph 10 of their defence in the claim for a declaration of trust assertedly had made a deemed admission under *Uniform Civil Procedure Rules* 1999 (Qld) r *166*, particularly in relation to paragraph 23 of the appellant's Statement of Claim. I respectfully agree with what Muir JA has written about the asserted admission. I add the following further details.

[7] That Statement of Claim contended that the appellant and deceased had begun living in a de facto relationship on 3 September 1983 and had maintained a relationship of a sexual, emotional, and life long commitment to each other until the deceased's death on 29 January 2004. It pleaded that the appellant gave the deceased the sum of $150 per fortnight towards household expenses, that the deceased did not work for remuneration at any stage and had as her only income a single parent's pension or an old age pension, and that the appellant was the major income earner and provider of living and lifestyle expenses during their (slightly more than) 20 years of living together. The Statement of Claim pleaded that the appellant, at the deceased's request, had sold a property owned by the appellant in Clontarf and had been told by the deceased that:

> "We don't need two houses. Sell your house and move in here with me."

[8] The appellant alleged that she had purchased a utility and caravan, and paid $5,000 on joint holidays for herself and the deceased, from the proceeds of the sale of the house, and that during the cohabitation period she had bought all the food, mowed the lawns, done the cooking, the washing and ironing and other physical domestic tasks, and had made other financial contributions including the purchase of a Toyota Hilux Ute in 1984, a Toyota Celica in 1988, a Toyota Corolla Hatchback in 1992, a Subaru Ute and a Camry in 1995, a Toyota Hilux in 1998, another Toyota Hilux in 1999, a Mazda Panel-van in June 2000, a motor scooter, as well, and paid for one half of the cost of construction of a shed. She also pleaded that she paid for the registration and running costs of the motor vehicles, and that during their co-habitation, the appellant and plaintiff used the caravan the appellant had bought but which was registered in the deceased's name, and for which the appellant had paid the registration and upkeep costs.

[9] That pleading continued in paragraphs 18 to 28 as follows:

> "18. At the time of her retirement the Plaintiff received $41,138.14 in superannuation and other entitlements.
>
> 19. The sum of $41,138.14 was invested by the Plaintiff in her daughter's name, Rosetta June Lynis-Huffenreuter.
>
> 20. At the time of her retirement the Plaintiff intended to purchase a house property with her superannuation moneys.
>
> 21. The Plaintiff did not purchase a house with her superannuation in reliance on statements made by Pearl to the Plaintiff in words to the effect, 'You don't need a house. You've already got one here with me.'
>
> 22. Between 1999 and the date of Pearl's death the Plaintiff acted in reliance on representations made by Pearl to the Plaintiff that she did not have to worry about a house because the house would be left by Pearl to the Plaintiff in the event of Pearl's death.

23. In reliance on those representations and the Plaintiff's understanding of Pearl's intentions the Plaintiff:-

23.1 At the request of Pearl would obtain moneys from her daughter and provide them to Pearl. The Plaintiff did so at Pearl's request and without question as to the use of the moneys on the following dates:-

09.04.99	$2,500.00
22.04.99	$2,500.00
28.05.99	$2,000.00
20.08.99	$4,138.19
10/02/00	$3,000.00
07/04/00	$5,000.00
29/06/00	$8,000.00
03/05/01	$1,000.00
01/11/01	$ 300.00
24/12/01	$ 500.00
07/03/02	$ 500.00
15/03/02	$ 500.00
04/04/02	$ 500.00
09/05/02	$1,000.00
21/07/03	$3,000.00
25/12/03	$1,000.00

23.2 Did not purchase a house property;

23.3 Carried out renovation work and maintenance work on the property, namely:-

23.3.1 the painting of the exterior of the property including the purchase of the paint for $1,200.00;

23.3.2 the construction of a dividing fence between the property and the adjoining property;

23.3.3 repairs and maintenance to the roof of the property;

23.3.4 painting of the inside of the property;

23.3.5 the purchase of household goods and chattels for the property;

23.3.6 the purchase of hardware for the renovation of the bathroom at the property;

23.3.7 the maintenance and care of the gardens and lawns of the property;

23.4 In reliance on the relationship between the parties in a social context contributed by the payment for Pearl for entertainment and meals when socialising as a couple;

23.4 Purchased for Pearl a ramp wheelchair trailer in 2002.

24. Had the Plaintiff not carried out the renovation and maintenance work pleaded in paragraph 22.3 above the property would have decreased in value due to neglect.

25. During the cohabitation period Pearl would refer to the property when talking to the Plaintiff as 'our house' and advised and informed the Plaintiff that they both held equal shares.

26. In the premises it is unconscionable for the Defendants to deny the Plaintiff has a beneficial interest in the property.

27. In the premises the Defendants hold the property on constructive trust for the Plaintiff.

28. By reason of the matters set out herein the Plaintiff is entitled to claim an interest in the property."

[10] The respondent's pleadings in defence admitted that the appellant and deceased both lived in the house at 103 Main Road, Clontarf from about 1988 until the deceased's death, but denied that they lived in a de facto relationship. That pleading particularly denied knowledge by the respondents of the various matters described in s 32DA(2) of the *Acts Interpretation Act* 1954 (Qld), which section sets out examples of relevant criteria to be taken into account in deciding whether two people are living together as a couple on a genuine domestic basis. The pleading went on to admit that the appellant paid the deceased rental of either $100 or $150 per fortnight from 1988 until the death of the deceased, and to admit that the deceased received a pension, but to contend that she also earned an irregular income from working in a shop and at flea markets. That pleading did not admit the appellant's claims that she had expended the $25,000 from the sale of her property at Clontarf on the purchase of a utility and caravan and on joint holidays, pleading that the defendant could not attest to the truth or otherwise of those claims. They further pleaded that the appellant had been in receipt of a carer's allowance, paid in contemplation that many of the functions the appellant described performing on a weekly basis would be undertaken by her, and that the respondents had assisted the deceased as well in household chores, as had others.

[11] Regarding the claim of contribution to the relationship made by the purchase of various vehicles, particularised in paragraph 15 of the Statement of Claim, the defendants pleaded that the deceased had her own motor vehicle throughout that time and in addition the use of a utility lent to the deceased by Ann-Margaret Linklater, the first respondent.

[12] Those pleadings then contended:

> "10 The Defendants do not admit the allegations in paragraphs 18 to 28, inclusive, on the grounds that the Defendants are unable to attest to their truth or otherwise save for the knowledge that, with reference to 23.3.5, the Plaintiff did purchase a freezer that remained her property at (the deceased's death)."

A large number of the matters in those paragraphs concerned the appellant's state of mind, and conversations between the appellant and the deceased. They would be difficult for the respondents to prove or disprove.

[13] The appellant gave evidence-in-chief about many of those matters, and was cross-examined on them. Her evidence-in-chief was that she began cohabitation with the deceased in 1983, at 103 Maine Road. She referred to her superannuation moneys, received when she stopped work at 59 and to her having given the money left over after she had bought a utility at the deceased's request, to the deceased to look after. She gave evidence of the purchase of a variety of vehicles, of the expenditure of her money on holidays and on food, and of the various vehicles which she bought. She said she bought that large number of new vehicles because the deceased would regularly say:

> "We need a new car".[1]

Her evidence-in-chief was of a more general character as to her financial contributions than her pleading was, but she did make claims in her oral evidence-in-chief of having given significant financial help to the deceased.

[14] She said also in evidence-in-chief that she and the deceased kept from the respondents (the deceased's daughters) any recognition or admission of the fact that the appellant and deceased were lovers and shared a bedroom. She also described doing the house cleaning, the ironing, washing and mowing, spending all of her income on food, clothing, and other matters, and that the deceased had always said when they were together that:

> "It was our house".

[15] She conceded in evidence-in-chief that the deceased would say to others that; "this is my house", and that the appellant was "just living here", and that the appellant had not objected to that. She agreed in cross-examination that in her application for a pension, and a carer's pension, she had described herself as the deceased's sister, rather than de facto partner. She also said in cross-examination that she had spent all of her superannuation funds, but could not say on what, and that the last expenditure of $1,000 on 25 December 2003 had been on a new television, stove, and washing machine. She agreed she had not given that $1,000 to the deceased. She also agreed that, while the deceased had referred to "our house" saying "you will live here until you die", the deceased had not said that the deceased would leave the appellant part of her estate. What the deceased had said was that:

> "I would be right. There would be plenty of linen and everything there for me for the rest of my life."[2]

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1 At AR 13.

The appellant's affidavit

[16] Those topics dealt with in her oral evidence, and the matters pleaded in her Statement of Claim, were also dealt with in her affidavit filed in the *Succession Act* application on 29 July 2004. In that affidavit, the appellant claimed she was the spouse and de facto partner of the deceased, as that term is defined by s 5AA of the *Succession Act* 1981. She described a sexual relationship which began when the appellant was 18, and lasted until the appellant went to Darwin in 1961, and resumed after the appellant left Darwin in early 1974. That resumption led to their setting up residence together at 103 Maine Road Clontarf. The affidavit asserted that from 1973 until 2003 they slept in the same bed with a continuing sexual and emotional relationship, they took holidays together and shared living and lifestyle expenses, with the greater burden falling on the appellant. The affidavit described the purchase of a utility and caravan for their joint use from the proceeds of sale of a property owned by the appellant, the expenditure of money by the appellant on joint holidays, and her role as the main provider during their lesbian relationship. It describes her anticipating that the house at 103 Maine Road Clontarf would be left to her for her use and enjoyment until she (the appellant) died, and that she understood the deceased was representing to her that she would receive that house as part of the deceased's estate. As with her oral evidence, the affidavit was not as detailed as her pleadings, but made the same general claims.

[17] The learned trial judge made a very careful examination of the evidence as to the relationship between the two women, both originally and in the later parts of the deceased's life. The learned judge formed a view critical of the appellant's credit, and the judge's findings included that the trailer the appellant bought was registered in the appellant's name, and that likewise all of the motor vehicles referred to by the appellant in her pleadings in paragraph 15.1 through to 15.7 of the Statement of Claim, were bought in the appellant's name only. The judge found that the money referred to in paragraph 23 of the Statement of Claim was not withdrawn at the deceased's request and given to the deceased, as contended. Further, an amount of $1,000 was not expended on the deceased on 25 December 2003 as pleaded (the evidence revealed it was used for the purchase of white goods when the deceased was admitted that same day to hospital), and nor was $8,000 expended on the deceased as alleged on 29 June 2000. The judge was also satisfied that there had been a mis-description, in the claim of the appellant spending $2,800 on the purchase of a motor scooter for the deceased; and those findings generally reflected a rejection of some quite significant facts asserted in the appellant's case. In essence, the judge did not accept that the appellant established that the claimed expenditures were at the request or instructions of the deceased, and for the latter's benefit. They were therefore not a contribution the appellant had made to their joint lifestyle.

[18] To establish a claim under the *Succession Act*, the appellant needed to prove she was the deceased's spouse, namely her de facto partner, and that they had lived together as a couple on a genuine domestic basis for a period of at least two years and which ended on the deceased's death. Matters relevant to proof of a de facto relationship are described in s 32DA(2) of the *Acts Interpretation Act*, including:

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[2] At AR 57.

> "(a) The nature and extent of their common residence;
>
> (b) The length of their relationship;
>
> (c) Whether or not a sexual relationship exists or existed;
>
> (d) The degree of financial dependence or interdependence, and any arrangements for financial support;
>
> (e) Their ownership, use and acquisition of property;
>
> (f) The degree of mutual commitment to a shared life, including the care and support of each other;
>
> (g) The care and support of children;
>
> (h) The performance of household tasks;
>
> (i) The reputation and public aspects of their relationship."

[19] The learned judge considered all of those matters, referring to the affidavit and oral evidence, and made specific findings. Those included that the appellant and deceased began living together in 1986, when the appellant's home was sold, that the judge was not satisfied that those parties had shared the same bedroom, that hand written notes by the deceased were about the appellant, and demonstrated a relationship which was inconsistent with a close and loving relationship, or an ongoing sexual relationship in the final years of the deceased's life. The judge was not satisfied that there was evidence of an ongoing sexual relationship between the appellant and deceased at any time after 1977, and that the objective evidence did not show there was a close and loving relationship from which the inference could be made of an ongoing sexual relationship in recent times.

[20] The judge held that for the majority of the period in which they cohabited, there was the normal sharing of household chores, and that while the appellant took some responsibility for a lot of the outside work, it did not appear that much maintenance or renovation work was in fact carried out. The judge held or found that there was no evidence of any public declaration by the two women that they were a lesbian couple, and the deceased had denied such a relationship to an officer from the Public Trustee, and the appellant had stated that she did not declare that relationship on her Centrelink form.

[21] The judge noted that the house at all times was registered solely in the deceased's name, and that when cars were purchased they were bought in one name only. When the appellant bought a motor vehicle, she registered that in her name, and the deceased did likewise. Ongoing costs seemed to have been kept separate. It was also clear, the judge concluded, that the deceased had made a number of previous Wills, and the appellant admitted at the hearing that she had not been mentioned in any of those. She had witnessed the Will dated 14 October 1988, one made when the appellant and the deceased, on her evidence, had been living in a lesbian

relationship for a number of years. That Will made no provision for the appellant. The judge was also satisfied that the appellant and deceased kept their finances quite separate from each other, and that the money paid by the appellant to the deceased was more accurately described as rent or board rather than a percentage of bills. The judge did not accept there was a financial interdependence, but considered there were quite distinct arrangements in place, in relation to the management of the finances of the appellant and deceased.

[22] Regarding the claim of the expenditure by the appellant of significant sums on the deceased, particularly advanced in support of the claim for a constructive or resulting trust, the judge accepted that the appellant carried out some renovation and maintenance work around the house, but not to the extent claimed by the appellant. The judge also accepted that the whitegoods in the house were bought by the appellant and belonged to her, and that there was no evidence that the appellant had ever bought a car for the deceased. The appellant had registered the trailer she bought in her own name and paid for the registration, and the judge found it was the appellant's property.

[23] The learned judge found that some of the appellant's answers were evasive and that the judge had difficulty in accepting them as truthful. The judge considered the appellant was not credible in her explanations as to the amounts she claimed to have withdrawn from her own monies (her superannuation funds), to give to the deceased. The judge recorded that under cross-examination a claimed amount of $8,000, allegedly given to the deceased, was admitted as having been in fact spent on the purchase of a vehicle registered in the appellant's own name. Similarly an amount of $1,000 withdrawn on 25 December 2003 was not for the deceased, was not asked for by the deceased nor given to her, and was spent on the purchase of whitegoods for the house while the deceased was in hospital.

[24] The learned judge concluded in summary, that:

- The applicant and deceased were friends for a period in excess of 30 years;
- They shared the same residence for about 18 years;
- They did not share the same bedroom;
- They did not refer to each other as partners and there was no manifestation to the public at large that they were a couple;
- There were no overt signs of affection;
- While there was evidence of passionate kissing in 1977, there was no evidence of an ongoing sexual relationship;
- They kept their bank accounts and finances separate;
- Cars were purchased by each in the name of one only;

- The house was in the name of the deceased as was the telephone, and she paid the rates and telephone bills;

- The appellant kept her superannuation payout in an account in the name of her daughter and son-in-law;

- In the Will the deceased described the appellant as her carer, consistent with the deceased's statement when asked by the Public Trustee as to the nature of the relationship;

- The parties shared household tasks;

- The appellant paid rent to the deceased and most expenses were shared equally.

[25] The judge held that while there was clear evidence of companionship over a long period and some evidence of a sexual relationship at some time, evidence that the appellant had assisted with work around the house and evidence that the appellant was the deceased's carer in her last years, the judge was not satisfied that that was sufficient to establish that the appellant was the deceased's de facto partner at the time of the death. The judge was also not satisfied that the appellant was the deceased's spouse, and dismissed the claim under s 41 of the *Succession Act*.

The declarations claimed

[26] The learned judge then considered the application for a declaration of a constructive or resulting trust. The learned judge considered that the Will made in 1988 leaving the house property to the deceased's daughters, to which the appellant was a witness, supported a finding by the judge that in or about 1986 the deceased did not promise or represent to the appellant that the appellant would receive an interest in the house. The judge also concluded that statements made in cross-examination by the appellant, attributing representations to the deceased, were vague and imprecise and also at variance with the representations relied on in the pleadings. They were also at variance with the intention that the deceased was demonstrating by her Wills executed in 1988, 1989, 1993, 1999 and 2003, namely that the property would be left to her daughters. The judge considered it extremely unlikely that the representations claimed in cross-examination were made. The judge was therefore not satisfied that the deceased made a representation that the house would be left to the appellant, or that the appellant would have a life tenancy in it.

[27] Regarding the claim that the expenditure of funds by the appellant on the deceased was made in reliance on those representations, the judge also independently rejected the contention that the sums referred to in paragraph 23 of the pleadings were withdrawn at the deceased's request, were given principally to the deceased, or were spent to any significant extent on the property. The findings leading to that conclusion included that all of the motor vehicles mentioned in paragraph 15 of the pleadings were purchased in the appellant's name only, and that during that period the deceased had her own car, and the $2,800 said to have been spent on a motor scooter for the deceased was in fact provided by the deceased.

[28] Those considerations led the judge to the observations that some of the deemed admissions were no longer able to be sustained, given the appellant's answers in cross-examination. The judge ultimately concluded that *UCPR* 366 and *UCPR* 367 allowed the judge to revisit the ruling, which the judge did, and held that the respondents had not made a deemed admission of the contents of paragraph 23. I agree with Muir JA that the learned judge was correct in her second ruling, namely that no admission should be deemed, of the facts pleaded in paragraph 23 of the Statement of Claim. The judge concluded that the applicant had not established a representation that the deceased would give her the house or a life interest in it, or that there was any common intention that the appellant was to receive the house; and the monies claimed to have been expended on the deceased at her request were not in fact expended as claimed, and no proper basis existed for the declaration of a constructive trust. The judge was also satisfied that no proper basis had been made for a resulting trust.

[29] As to the contention that the learned judge ought not to have reconsidered the earlier ruling that the contents of paragraph 23 should be deemed to have been admitted by the respondents, the judge was obliged to come to a conclusion in both the application for a declaration for a trust, and on the application for orders under the *Succession Act*, on the evidence put before the judge. Where that evidence included admissions by the respondents, whether express or deemed, those would not necessarily be the only evidence, or overwhelmingly persuasive evidence. Here, the judge had good reason to be satisfied that the deemed admissions, treated as admissions, should be given relatively little or no weight, where they were contradicted by the appellant's own evidence on the same matters. The respondents' senior counsel was certainly entitled to cross-examine the appellant on her evidence-in-chief, given orally, and on her affidavit evidence read in support of her *Succession Act* claim. Since that covered the same matters as some of the pleadings, it was inevitable that some answers would qualify or contradict the assertions in the pleadings. It was quite appropriate for the learned judge to consider what the evidence did establish, and not to rely solely on the claims made in the appellant's pleadings. Those claims were necessarily modified by the inconsistent and more accurate details established in oral evidence.

[30] **MUIR JA:** Pearl Marie Linklater died on 29 January 2004 leaving a will dated 2 December 2003 under which her two daughters took the whole of her estate save for one minor bequest in favour of the appellant. The appellant, who claimed to be in a de facto relationship with the deceased, commenced proceedings by originating application under s 41 of the *Succession Act* 1981 *(Qld)* for an order that provision be made for her out of the deceased's estate. The daughters were the respondents to that application. The appellant also brought proceedings, commenced by claim, against the respondents claiming a declaration that the respondents hold their interest in the house property, in which the appellant and the deceased had lived for many years prior to the deceased's death, on a constructive trust or, alternatively, a resulting trust for the appellant.

[31] The two proceedings were tried together before a judge of the Trial Division of this Court. On 30 May 2007 the learned primary judge made orders dismissing the *Succession Act* application and the claims made in the proceedings commenced by

claim ("the action"). She gave judgment for the respondents on a counterclaim and ordered that the appellant vacate the property.

The grounds of appeal

[32] There is no appeal in respect of the *Succession Act* proceedings.

[33] The first ground of appeal is that the primary judge erred in reversing a ruling made during the trial that the allegations in paragraph 23 of the statement of claim in the action were deemed to have been admitted by the respondents by operation of r 166(5) of the *Uniform Civil Procedure Rules*.

[34] The grounds in relation to the alleged constructive or resulting trust are as follows. The primary judge erred in holding that a constructive trust could not arise where no specific representations had been made and where there was no evidence of a common intention or common purpose. The findings of the primary judge as to expenditure of money and work done by the appellant in relation to the property justified a finding of "a constructive trust equal to a life interest in the property namely rent at $195 per week for 10 years, the sum of $80,535". The deemed admissions as to the appellant's expenditure also support the imposition of such a trust and the conclusion that there was a resulting trust. The primary judge should have found by reference to representations by the deceased to the appellant and the conduct of the appellant in reliance on the deceased's representations that "the property was a joint property and [the appellant] would be entitled to live there with the contents of the property until her death".

[35] The appellant also challenges factual findings of the primary judge. It is argued that, irrespective of her Honour's findings as to the appellant's credibility, the evidence demonstrates that the deceased's outgoings exceeded her income. The inference to be drawn from this, according to the argument, is that the deficiency was met by the appellant's financial contributions to the maintenance, improvement and running of the property and household.

The deemed admission ground

[36] The appellant alleged in paragraph 23 of the statement of claim that, in reliance on representations made by the deceased to the appellant, the appellant, at the request of the deceased, "and without question as to the use of the moneys" obtained moneys from her daughter and gave them to the deceased on 16 separate occasions between 9 April 1999 and 25 December 2003. It seems implicit, having regard to paragraphs 18 to 22, that the moneys referred to in paragraph 23 were superannuation and other moneys of the appellant invested in her daughter's name. The sums of money, listed in paragraph 23.1, were alleged to have varied in amount from $300 to $8,000. Paragraph 23 further alleges that, in reliance on the representations, the appellant did not purchase a house property, carried out renovation and maintenance work on the property and purchased a wheelchair ramp trailer for the deceased in 2002.

[37] The representations the subject of paragraph 23 appear to be representations made at various times to the effect: "You don't need a house. You've already got one here with me"[3] and to the effect that the appellant did not have to worry about a house because the house would be left by the deceased to the appellant in the event of the deceased's death.[4] In an affidavit filed in the *Succession Act* proceedings, the appellant swore to: having paid for the wheelchair ramp trailer out of her own bank account; making a contribution of $150 a fortnight towards rates and electricity and having expended the balance of the appellant's income on household expenses, improvements to the property, food, holidays and clothing for both herself and the deceased.

[38] The appellant also swore in the affidavit that the deceased "up until her death … had represented … that [the appellant] would receive the house … and part of [the deceased's] estate" and that the deceased would regularly represent to friends and family that the house "was 'our' house and that we both owned equal shares". The affidavit did not address specifically all of the paragraph 23.1 payments.

The argument and ruling in respect of paragraph 10 of the defence in the course of the trial

[39] In cross-examination the respondents' counsel directed the appellant to paragraph 23 of the statement of claim. The cross-examination established that a payment of $8,000 made on 29 June 2000 listed in paragraph 23.1 was used in the purchase of a motor vehicle registered in the appellant's name. Counsel then established that the final sum listed in paragraph 23.1 had been used in the purchase of a washing machine, a new stove and television on the day the deceased went into hospital for the last time. At this juncture, the appellant's counsel said:

> "If my learned friend is going to put forward a positive case disputing the allegations which are contained in 23.1 I have an objection because paragraph 10 of the defence which deals with delegations (sic) in paragraph 18 to 28 merely is a do not admit … because the defendants are unable to attest to the truth or otherwise."

Counsel referred to r 166(4) of the *Uniform Civil Procedure Rules* and submitted:

> "Now, that non-admission, in my submission, falls squarely within that, so these facts are admitted. It's not a matter that my learned friend can now cross-examine or … put forward a case which is different because there is no basis set forward in paragraph 10."

[40] The respondents' counsel submitted that it was for the appellant to prove her case. He denied that the respondents were setting up a positive case and said that "this question goes to her credit". The appellant's counsel then submitted that "if it's an admitted fact on the rules … the matter's over. It's not in contest. It would be irrelevant to ask questions about it". The argument on both sides did not attempt any analysis of the meaning of r 166 or its application to the words of paragraph 10.

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3 Statement of claim, paragraph 21.

4 Statement of claim, paragraph 22.

[41] The matter adjourned for a luncheon break and, on returning, the primary judge ruled:

> "I have considered the issue in the break and whilst I accept that the matters set out in paragraph 23 are deemed admissions, I will allow further cross-examination in relation to the matters in paragraph 23 given that it does go so crucially to the issue of credit."

Cross-examination then proceeded.

The further hearing on 27 April 2007

[42] The trial took place on 15 and 16 November 2006 and the primary judge reserved her decision. On 24 April 2007, the primary judge raised with counsel her concerns about the ruling in respect of paragraph 23 and informed them that the matter would be listed for further hearing on 27 April. She requested counsel to consider:

(a) "…Whether the ruling in relation to paragraph 23 should be revisited, particularly in light of rule 367";

(b) "… What effect did the admission have in the application where there are no rulings, and what effect do the findings in the application have in respect of admissions, if the findings and the admissions are inconsistent?"

(c) "… Whether any party wished to adduce further evidence"

(d) "… Whether any party wished to make further submissions."

[43] The matter came back on for hearing on 27 April 2007. At the outset of proceedings the primary judge restated the matters she wished the parties to address. In particular, no doubt with the appellant in mind, she raised the prospect that a party may wish to adduce further evidence. Counsel for the appellant conceded that he was unable to say whether the trial would have been conducted differently had there been a different ruling on the deemed admission point. In this regard, he said:

> "I cannot tell your Honour why I took steps in the trial, why I didn't take steps in the trial because it happened five months ago. Whether I would now make application to call new evidence after Mr Murphy's application if your Honour allowed it, would require me to revisit the entire matter. That is, effectively consider the trial again. That places an incredible prejudice on the plaintiff/applicant because that involves costs which may not be met at any stage."

[44] Counsel for the appellant declined to make an application to call further evidence on the basis that this course would require him "to revisit the entire matter" and that this would involve the appellant in costs "which may not be met". He submitted, somewhat opaquely, that the appropriate course for the primary judge to follow was to determine the matter on the evidence as it stood. He remarked "… if there are difficulties with your Honour's judgment, then there are avenues of recourse available to one or either party …"

The reversal of the ruling in respect of paragraph 10

[45] The primary judge deferred her decision on the matter until holding, when delivering her reasons on 30 May 2007, that there was no deemed admission of the allegations in paragraph 23.

Did paragraph 10 comply with rule 166?

[46] Subrules (3), (4), (5) and (6) of r 166 of the *Uniform Civil Procedure Rules* provide:

> "(3) A party may plead a nonadmission only if –
>
> (a) the party has made inquiries to find out whether the allegation is true or untrue; and
>
> (b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; and
>
> (c) the party remains uncertain as to the truth or falsity of the allegation.
>
> (4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.
>
> (5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.
>
> (6) A party making a nonadmission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately."

[47] Paragraph 10 of the defence states:

> "The defendants do not admit the allegations in paragraphs 18 to 28, inclusive, on the grounds that the defendants are unable to attest to the truth or otherwise save for their knowledge that, with reference to 23.3.5, the [applicant] did purchase a freezer that remained her property at Pearl's death."

[48] In my view the primary judge's revised ruling was correct. The non-admission in paragraph 10 of the defence was accompanied by "a direct explanation for the party's belief that the allegation … can not be admitted". The explanation, which paid scant heed to grammatical rules and was not felicitously expressed, was that the respondents "are unable to attest to the truth or otherwise" of the allegations. The paragraph also makes an admission concerning one of the many allegations in paragraph 23, showing that the respondents had turned their minds to the question of what should or should not be admitted.

[49] Despite its lack of clarity, I consider that a fair construction of the paragraph is that it means "The truth of the allegations is not within the knowledge or means of knowledge" of the respondents.

[50] The pleading should be construed in light of the requirements of sub-rules (3) and (6) and with regard to the presumption of regularity.[5] There is no implicit requirement in subrule (4) that a pleaded non-admission recites or adverts expressly to the requirements of subrule (3). Compliance with subrule (3) is a precondition of the right to plead the non-admission. In his submissions to the primary judge, the appellant's counsel did not suggest that there had been non-compliance with those provisions. The argument was based entirely on the wording of paragraph 10. Another consideration relevant to the construction of paragraph 10 is the fact that many of the matters alleged in paragraph 23 were highly likely to be matters peculiarly within the knowledge of the appellant.

Should there be a retrial as a result of the changed ruling in respect of paragraph 10?

[51] The deemed admission objection by the appellant's counsel, even if technically correct, contrary to my view, was an adventurous one. The appellant's counsel should have anticipated that, if the objection succeeded, counsel for the respondents would make application to amend the defence to comply with the rules. He should have appreciated also that the prospects of such an application failing were slight and that if it did fail, the respondents would have had strong grounds of appeal.

[52] As it turned out, no application to amend was forthcoming until the matter was argued again on 27 April 2007. The failure to seek leave to amend was remarkable as paragraph 23 contained express or implied allegations, proof of which was central to the appellant's case. It should have been apparent also that many, if not all, of the allegations in paragraph 23 were relevant to the *Succession Act* application and that any deemed admission of allegations in the statement of claim in the action would not, without more, constitute deemed admissions in the *Succession Act* proceedings. Equally obvious was the undesirability of permitting this overlapping evidence to be the subject of a different evidentiary ruling or status giving rise to the possibility of different findings of fact in the two proceedings being heard together.

[53] The purpose of the *Uniform Civil Procedure Rules* "is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense". They "are to be applied … with the objective of avoiding undue delay, expense and technicality."[6] Plainly, the Rules are to be applied with a view to facilitating the conduct of litigation and not so as to obscure the real issues and impede the progress of a trial.

[54] Those provisions are consistent with the principles expressed by Bowen LJ in the following passage from his reasons in *Cropper v Smith*,[7] the authority of which was affirmed by *Queensland v J L Holdings Pty Ltd*:[8]

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5 As to which, see *Carpenter v Carpenter Grazing Co Ltd* (1987) 5 ACLC 506 at 514 and *Popovic v Tanasijevic (No 5)* (2000) 34 ACSR 1.

6 Rule 5, *Uniform Civil Procedure Rules* 1999 (Qld).

7 (1884) 26 Ch D 700 at 710.

8 (1997) 189 CLR 146 at 154.

> "Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

[55] Every decision must be made in the light of the subject facts guided by the principles stated in the Rules or expounded by binding authorities such as *J L Holdings*. This is not a case in which it was or could have been suggested that the appellant had suffered or was likely to suffer any relevant prejudice if an amendment to paragraph 10 was permitted. There was no suggestion that the trial would go off or that the hearing of other cases might be postponed. Had there been a breach of r 166(4) it would have been technical or substantially so. If leave to amend had been requested, the appropriate course, consistently with the direction in r 5 to apply the Rules "with the object of avoiding undue delay, expense and technicality", would have been to give leave for the pleading to be amended so that the real issues between the parties could be determined justly and expeditiously.

[56] At the further hearing on 27 April the appellant's counsel did not argue that the earlier ruling was correct. But if issue was to be taken subsequently with any revised ruling, the appellant's counsel was obliged to argue the matter when given the opportunity. For reasons already given, the original ruling was one which gave rise to obvious problems and was in need of correction. Even if the primary judge had adhered to the ruling, particularly in the light of the view she had formed as to the appellant's credibility, she could not have been criticised for re-listing the matter to permit the parties to agitate the issues identified by her on 24 and 27 April 2007. In the event, the parties were given ample opportunity to advance further argument for or against the proposed change of ruling. The appellant's counsel was invited, expressly, to consider whether further evidence should be called. There was no failure to afford procedural fairness.

[57] The submission that a decision on whether to make an application to call new evidence would require the appellant's counsel "to revisit the entire matter" was somewhat farfetched. The issues were in fairly short compass and the evidence limited in extent. It would not have been difficult for the appellant's counsel to ascertain the extent and availability of the relevant evidence. A more difficult question would have been whether to risk recalling the appellant and, perhaps, her daughter. Resolution of those and related matters, however, could not have presented any intractable problem.

[58] The way in which the argument was approached by the appellant's counsel was, in my view, unattractive. It was to submit, in effect, that, even if the primary judge had

made an erroneous ruling, the respondents were forever fixed with the consequences of that ruling because of the cost of reversing it. The claim that the cost of deciding whether to call further evidence was prohibitive does not sit comfortably with the submission that the primary judge should determine the matter on the evidence as it then stood and leave any resulting problem to be addressed on appeal. One way of addressing the matter, if the appellant's arguments had substance, is that put forward here by the appellant's counsel, namely by retrial. One would think that the cost of this appeal and of a retrial would greatly outweigh the cost to the appellant of her counsel's giving due consideration on about 27 April 2007 to the question of whether further evidence should be adduced.

[59] For the above reasons, I can see no basis for ordering a retrial.

The constructive trust case

[60] The appellant's constructive or resulting trust case, in substance, is that the appellant derived an interest in the dwelling house as a result of:

(a) the representations referred to in paragraphs [8] and [9] above which representations were relied on by the appellant to her disadvantage;
(b) the expenditure of moneys by the appellant for the benefit of the deceased during the term of their cohabitation including the expenditure of $100 per week on food, $75 per week on account of household expenses;
(c) the expenditure of moneys by way of "financial contributions" on a number of motor vehicles;
(d) payment of registration and running costs of such motor vehicles;
(e) the performance by the appellant for the deceased of domestic tasks such as cooking, mowing, washing and ironing;
(f) the provision by the appellant to the deceased of the moneys listed in paragraph 23.1 of the statement of claim; and
(g) the carrying out of renovation and maintenance work on the property.

The primary judge's findings in relation to the trust case

[61] The primary judge did not accept that the representations relied upon by the appellant were made. She found that some whitegoods in the house including a television, washing machine, a stove and a freezer were purchased by the appellant and remained her property. She found that the motor vehicles and a caravan alleged to have been purchased by the appellant for the deceased remained the property of the appellant. $2,800 alleged to have been spent by the appellant on the purchase of a motor scooter for the deceased was found to have been provided by the deceased. The primary judge did not accept that the applicant "spent money on repairs and renovations to the house to any significant extent" or that moneys were withdrawn from the account of the appellant's superannuation moneys at the deceased's request and "given principally to the deceased or … spent to any significant extent on the property".

[62] There was a general finding by the primary judge that she was not satisfied:

> " … that the moneys claimed to have been expended on the deceased at her request were in fact expended in the way claimed."

The reasons continue:

> "… I am satisfied that the applicant spent significant funds to the extent of $42,000 which were her superannuation moneys during the years 1999 to 2003 some of which was clearly spent on the purchase of vehicles and white goods which are owned by the applicant. Whilst I have not accepted that the amounts claimed by the applicant were spent in the way claimed I do accept that she did do work some (sic) around the property but not to the extent claimed and that some amounts may have been spent on the maintenance of the property but not to any significant extent."

[63] The primary judge did not even accept the evidence of the appellant that over the period of cohabitation she did the majority of the household chores, preferring the evidence of the respondents in that regard. She did accept that the appellant did the household work after she became the deceased's carer in 2001 but her Honour found that by this time the appellant was in receipt of a Centrelink carer allowance. The appellant's own evidence was to the effect that she did not concern herself in the deceased's financial affairs and that she and the deceased maintained separate bank accounts. The primary judge concluded that the $150 per fortnight paid by the appellant to the deceased in latter years was in the nature of rent and not merely a contribution towards rates and electricity.

A summary of the primary judge's findings

[64] The overall effect of the primary judge's findings is as follows:

(a) No representation as to an interest or right to reside in the dwelling house, let alone reliance on any such representation, was established;

(b) The appellant provided the bulk of the whitegoods used by the appellant and the deceased, but the whitegoods remained the appellant's property;

(c) No moneys of any significance were expended by the appellant on repairs or improvements to the house;[9]

(d) The rent paid by the appellant was "fairly minimal". The current rental for the house was $195 per week;

(e) It was not proved that the appellant did the majority of household chores before she became a paid carer;

(f) The making of the paragraph 23.1 payments by the appellant to the deceased was not established and nor was any disproportionate contribution by the appellant to household expenditure; and

(g) The appellant and the deceased kept their finances separately.

[65] Unless these findings are disturbed, there is little evidence which would support the claimed constructive or resulting trust.

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[9] The thrust of the evidence is in fact that the house remained in a fairly rundown condition throughout.

Was there a constructive or resulting trust?

[66] One of the grounds of appeal relied on the finding that "a constructive trust cannot be said to arise in the circumstances of this case given there were no specific representations made and no evidence of a common intention or common purpose".

[67] A constructive trust will be imposed in appropriate circumstances regardless of actual or presumed agreement or the intention of the parties.[10] But it does not seem to me that, in her reasons the primary judge was asserting to the contrary. Her understanding, as appears from the reasons, was that the appellant's argument was based on the existence of a common intention "to create an interest in the property" evidenced by or coupled with representations by the deceased as to the existence of such an interest which representations were acted upon by the appellant to her detriment.

[68] Counsel for the appellant relied on statements of principle in *Baumgartner v Baumgartner*[11] and *Muschinski v Dodds.*[12] Mason CJ, Wilson and Deane JJ, in their joint judgment in *Baumgartner* pointed out that the constructive trust was a remedy which equity imposes "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". [13]

[69] *Baumgartner* was a case involving the pooling of financial resources by parties living in a de facto relationship. The joint judgment explains[14] that –

> "Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent."

[70] Attention is drawn[15] to Deane J's observations in *Muschinski v Dodds*[16] to the effect that a constructive trust will not be imposed "in accordance with idiosyncratic notions of what is just and fair" whilst acknowledging the relevance of notions of justice and fairness to "the traditional concept of unconscionable conduct".

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10 *Muschinski v Dodds* (1985) 160 CLR 583 at 614.
11 (1987) 164 CLR 137.
12 (1985) 160 CLR 583 at 614.
13 At 148, citing Deane J in *Muschinski v Dodds*.
14 At 149.
15 At 148.
16 (1985) 160 CLR 583 at 615, 616.

[71] In *Muschinski*[17] Deane J elaborated on circumstances in which a court applying equitable principles would identify unconscionable conduct and give relief from it. After referring to the circumstances identified by Lord Cairns LC in *Atwood v Maude*[18] in which equity would prevent the assertion or exercise of legal rights where such assertion or exercise would constitute unconscionable conduct, Deane J said –

> "Those circumstances can be more precisely defined by saying that 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 to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do: cf. *Atwood v. Maude*, [19] and per Jessel M.R., *Lyon v Tweddell*[20]".

[72] Earlier in his reasons, Deane J had made the point that injustice and unfairness, though relevant, were in themselves insufficient:[21]

> "The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other (cf. *Hepworth v. Hepworth* [1963] HCA 49; (1963) 110 CLR 309, at pp 317-318). Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another. That is not to say that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity cf., e.g., *Legione v. Hateley* [1983] HCA 11; (1983) 152 CLR 406, at p 444; *Commercial Bank of Australia Ltd. v. Amadio* [1983] HCA 14; (1983) 151 CLR 447, at pp 461-464, 474-475."

[73] In this case, on the primary judge's findings, the appellant and the deceased each made contributions to the running expenses of the household during their cohabitation. Their contributions did not differ to any significant degree from contributions of the kind commonly made by persons sharing rented accommodation or, for that matter, by a person renting accommodation in a house owned by the other occupant, save that the appellant maintained the yard. Those are

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17 At 620.
18 (1868) LR 3 Ch App 369 at 375.
19 (1868) LR 3 Ch App 369 at 374-375.
20 (1881) 17 Ch D 529 at 531.
21 *Muschinski v Dodds* at 616.

not circumstances in which a monetary or other contribution is made without an intention that the other party should enjoy the benefit provided by the contribution. Nor do such circumstances render it unconscionable for a house owner such as the deceased to retain whatever benefits may have been provided by the other person during the cohabitation. Any denial by the deceased that the appellant had an interest in the house would not have been unconscionable. The circumstances under consideration, in themselves, would not give rise to a reasonable expectation on the part of either of the appellant or the deceased that the appellant had acquired an interest in the property.

[74] The appellant's case would have been assisted by a finding that the appellant and the deceased had a de facto relationship.[22] Nothing in the authorities, however suggests that the mere existence of long-term cohabitation, even in a de facto relationship and even if combined with sharing of household expenditure and a division of household labour, suffices to justify the imposition of a constructive trust in respect of the shared home owned by one of the cohabitants. In that regard, Gleeson CJ, in *Green v Green*,[23] in a passage referred to with approval by Sheller JA in *Bryson v Bryant*,[24] said:[25]

> "… it is clear that the mere existence of a matrimonial or de facto relationship, combined with express or implied undertakings to provide support and accommodation, will not form a sufficient basis for concluding that there is a constructive trust by virtue of which a proprietary interest in the home occupied by the parties is created. …"

[75] Relevant also is what Macrossan CJ in *Dunne v Turner*[26] referred to as "the neutralising effect" of the corresponding contribution by the deceased during the period of cohabitation. It is not only financial contributions which are relevant[27] and the property itself was a significant contribution by the deceased. On the facts found by the primary judge it is not established that the benefit to the appellant of a low rent significantly exceeded in value any disproportionate contribution she may have made to the maintenance and improvement of the property, and to household and living expenses. Indeed the findings do not support the conclusion that there was any disproportionate contribution.

[76] The case for a constructive trust has not been made out and it is difficult to see how a resulting trust in respect of the deceased's property could have arisen in the circumstances under consideration. No argument was advanced in support of the contention that the property was held on a resulting trust and it is unnecessary to further consider that ground.

The challenge to the primary judge's findings of fact

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22 *Muschinski* per Deane J at 622 and *Green v Green* (1989) 17 NSWLR 343 at 359 per Gleeson CJ citing *Hayward v Giordani* [1983] NZLR 140 at 148.

23 (1989) 17 NSWLR 343.

24 (1992) 29 NSWLR 188 at 221.

25 At 353. See also the observations of Mahoney JA at 367.

26 [1996] QCA 272; CA No 196 of 1995, 20 August 1996.

27 *Muschinski v Dodds* at 622.

[77] The argument advanced on behalf of the appellant did not seek to challenge the primary judge's findings to the effect that the appellant was not a credible witness. Rather, it was argued that it was not open to the primary judge "to refute all of the evidence of the appellant given the uncontradicted facts regarding the income of the deceased". The essence of the point made was that notwithstanding the fact that the sole income of the deceased for many years was a pension of approximately $430 per fortnight, she was able to purchase and run motor vehicles, clothe herself well and maintain an active social life. Consequently, it is contended, the deceased must have been deriving substantial financial benefits from the appellant.

[78] The role of the appellate court in reviewing a trial judge's findings of fact is explained in the following passage from the reasons of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy*:[28]

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'. In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
> > '[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.'
>
> As this Court there said, that approach was 'not only sound in law, but beneficial in ... operation'."

[79] If the appellant's argument was based on inferences to be drawn from undisputed facts, as the appellant's counsel submits, this Court would be in as good a position in that regard as the primary judge. It is doubtful, however, that there is no significant dispute about the deceased's general level of income and the evidence concerning her outgoings is far from clear or uncontested. To a degree, any determination in that regard involves accepting the evidence of some witnesses in preference to others and the weighing and piecing together of the evidence of a number of witnesses in order to arrive at a conclusion. In these circumstances, the primary judge's findings must be afforded due deference.

[80] The evidence of the respondents, which the primary judge preferred to that of the appellant, does not suggest that the social activities of the deceased occasioned much expenditure.

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28 (2003) 214 CLR 118 at 126 -127.

[81] The evidence is to the effect that only one motor vehicle, a Toyota Celica, was registered in the deceased's name during the period of cohabitation. Its cost and date of acquisition are not revealed by the evidence. The deceased purchased a mobility scooter for $2,800 in January 2002. According to the appellant, she and the deceased jointly purchased another such scooter for $900. The affidavit evidence of the respondent Mrs Linklater appears to assert, by necessary implication, that the deceased owned no motor vehicle at the date of her death. The evidence concerning motor vehicles on which the appellant's argument on appeal relies was rejected by the primary judge and no error has been demonstrated in her reasons in this regard.

[82] There is evidence that until some time in the 1990s the deceased sold goods at flea markets. The returns from these activities are unknown but it may be inferred that they were sufficient to justify the acquisition of a larger vehicle: the appellant swore that a Toyota Hilux was replaced by a larger Mazda van at the deceased's request. The primary judge held that the deceased "did receive some funds from her flea market activities".

[83] There is evidence that the deceased had approximately $10,000 invested until 1998. From 1998 to 2003 her bank balance was as high as $3,000 to $4,000 at times. The appellant, throughout the relationship, made rental payments which contributed to the expenses of maintaining the house. She conceded in cross-examination that household expenses were "effectively split … down the middle" and she also made the other minor contributions found by the primary judge. Her purchase of whitegoods and, no doubt her ownership and use of motor vehicles, also helped reduce the deceased's outgoings.

[84] The uncertain evidence of both income and outgoings makes it extremely difficult for the appellant to challenge successfully the primary judge's findings based on an asserted excess of the deceased's outgoings over income. It has not been shown that the primary judge "has failed to use or has palpably misused (her) advantage" or has "acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."[29] In my view, it has not been shown on the balance of probabilities that the way in which the deceased was able to meet her expenses, other than shared household expenses, was by means of significant gifts from the appellant. Nor has it been demonstrated that the primary judge erred in the findings of facts under discussion.

Conclusion

[85] For the above reasons, I would order that the appeal be dismissed with costs.

[86] **DOUGLAS J**: I have had the advantage of reading the reasons of Jerrard JA and Muir JA and agree with them and with the order proposed by Muir JA.

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29 See *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.