SUPREME COURT OF QUEENSLAND

CITATION:	*Hill v Williamson* [2002] QSC 220
PARTIES:	**ALLAN HILL** (plaintiff) **v** **JUDITH HILDA WILLIAMSON** **(also known as JUDITH HILDA FULLER)** **formerly trading as "JUDYS AUTO PARTS"** (defendant)
FILE NO/S:	SC5521 of 2000
DIVISION:	Supreme Court
PROCEEDING:	Civil Trial
DELIVERED ON:	2 August 2002
DELIVERED AT:	Brisbane
HEARING DATE:	19 – 22 November 2001
JUDGE:	Douglas J
ORDER:	**1. That the defendant deliver up to the plaintiff the engagement ring referred to paragraph 3 of the Amended Statement of Claim.** **2. That the plaintiff and the defendant hold the property more properly described as Lot 122 on Registered Plan 174875, County of Ward, Parish of Tallebudgera and located at 42 Coorabin Court, Tallebudgera in the State of Queensland, on trust for the plaintiff and the defendant in the proportion of 60% to the plaintiff and 40% to the defendant. ("the property").** **3. The plaintiff have judgement against the defendant in the sum of $165,423.66 (One Hundred and Sixty five Thousand Four Hundred and Twenty three Dollars and Sixty six Cents) including interest in the sum of $26,683.80 (Twenty six Thousand Six Hundred and Eighty three Dollars and Eighty Cents).** **4. The defendant pay the plaintiff's costs of and incidental to the Claim and the Counterclaim including any reserved costs on the standard basis until 31 October 2000 at which date onwards costs are to be calculated on an indemnity basis to be assessed if not otherwise agreed.** **5. Each party have liberty to apply.**
CATCHWORDS:	TRUST AND TRUSTEES – Constructive trusts - GIFTS – Essentials of perfect gifts - EQUITY – Unconscionability

Baumgartner v Baumgartner (1987) 164 CLR 137
Calverley v Green (1984) 155 CLR 242
Dunn v Turner [1996] QCA 272 (95/0196)
Ikeuchi v Liu & Ors [2001] QSC 54
Muchinski v Dodds (1985) 160 CLR 583

COUNSEL: A.P. Collins for the plaintiff
N.J. Thompson for the defendant.

SOLICITORS: Fitz-Walter Lawyers for the plaintiff
Lehns Solicitors for the defendant

[1] **DOUGLAS J:** The plaintiff and the defendant met for the first time on or around the Australia Day long week end in 1997. There is some dispute as to whether they met through an introduction agency but that has no bearing on the matters before me.

[2] The parties became intimate and a relationship developed rather quickly. They went on a trip together to Taiwan at Easter 1997. The plaintiff contends that the parties became "engaged to be married" in May 1997. He purchased an engagement ring in late May 1997 at the cost of $3,200.

[3] On the other hand, the defendant contends that the parties were not engaged, nor was there any intention to marry. This is alleged even though the defendant stayed at that plaintiff's home on three or four nights per week. On 16 October 1997, the parties went on a business trip to Paris where the plaintiff purchased the defendant a wedding ring which was worn by her until the parties returned to Australia.

[4] A home was purchased in their joint names in January 1999 at Tallebudgera. The mortgage was in joint names for a period of 10 years. The purchase price was $255,000. The plaintiff provided $50,000 towards this price and the balance was borrowed. The house, according to the plaintiff, was planned to be their matrimonial home. The plaintiff met the cost of stamp duty ($3,127.95), legal fees (approximately $800), all of the mortgage payments to the date of trial ($105,000), the rates ($3,893.75) and insurance (approximately $2,400).

[5] During the course of the relationship, the plaintiff paid for a number of items and contributed sums of money in support of a business conducted by the defendant known as "Judy's Auto Parts". It is also not disputed that the plaintiff performed services by way of the rewinding of automotive parts for the benefit of the defendant's business.

[6] Both the plaintiff and the defendant had been in previous unfortunate relationships. This particularly applies to the defendant.

[7] The plaintiff appeared to be emotionally weak. He had a strong desire to be in a relationship with the defendant and as such, he tended to engage her in a love affair with an enthusiasm that was not shared to the same degree by the defendant. He lavished gifts upon the defendant and on many occasions, took her to dinner at expensive restaurants. Such generosity I find to be quite ingenuous and naïve,

particularly bearing in mind the fact that he and his companies were heavily indebted to the National Australia Bank throughout this period.

[8] I find that despite the plaintiff's belief that the defendant intended to marry him, she never had any such intention. The parties lived in what could be called a "de facto relationship" from May 1998 until July 1999. Generally, I accept the plaintiff's evidence.

[9] On the other hand, I cannot accept the defendant as a truthful witness. Without being exhaustive, there are a number of matters which indicate that the defendant was highly manipulative and engaged in systemic dishonesty, particularly during the latter part of their relationship. In particular she:

(a) refused to disclose significant documentation that could have supported the plaintiff's case;
(b) failed to produce documents that would have verified her case;
(c) refused, until virtually forced by the amount of evidence at the trial, to accept the existence of a de facto relationship and/or "the engagement"; and
(d) made a series of general assertions (not verified by paperwork) in respect of some of the smaller transactions for which she makes claim.

If one looks at the documents, there appears to have been a deliberate course of dishonesty on the part of the defendant.

[10] The defendant failed to make proper disclosure before the trial. Indeed, it became apparent to me that full disclosure was not even made at the trial's conclusion. For example, the plaintiff asserted that the parties had maintained a sexual relationship after the termination of the de facto relationship on 8 July 1999, and in particular, that there had been a dinner between them on 16 October 1999 for the plaintiff's birthday. He asserts that he invited her home that night and that she agreed. He said that she made three mobile telephone calls to him on the evening as she drove home and he thought "all my lucky days have come at once". She denied that this occurred. A simple way to prove or disprove the matter was for her to produce her mobile telephone accounts for that evening which would have indicated whether or not she had made the three telephone calls to him. I am suspicious of her motivation for not producing such accounts.

[11] As to her commercial transactions, there is a relevant absence of documents.

[12] As to the engagement ring, I find that the defendant never had any intention to marry the plaintiff. In that circumstance, the defendant is obliged to return the ring to the plaintiff. I am content to rely upon the reasons of Muir J in *Ikeuchi v Liu & Ors* [2001] QSC 54, particularly at para 109.

[13] I shall therefore order that the defendant return the engagement ring to the plaintiff.

[14] With regards to the house, I refer to *Calverley v Green* (1984) 155 CLR 242. More particularly, see the words of Professor Cope in his text *Constructive Trusts* where the author said:

> "…..On this view such payments do not alter the original equitable ownership of the house which depends upon the contributions made to the purchase price at the time of the purchase. In the absence of any agreement made after the purchase to alter the equitable interests acquired when the property was purchased, such payments are not regarded as working any alteration of the beneficial interests. Where the court is satisfied that the payer has made the payments of the mortgage instalments out of her or his own funds and on her or his own account and without intending the legal mortgagor ultimately to have the benefit of these payments, the payer may then be entitled to contribution from the mortgagor the payer's share of the payments and to an equitable charge to secure the payer's contribution. On the other hand "mortgage payments may qualify the parties' interest under a resulting trust where the parties have intended to acquire the property as a mortgage-free investment. Where this is so, the purchase price of the land may included the price paid to free the land of the mortgage as well as the price paid for the title to the land itself and so both amounts will then have to be taken into account as contributions to the purchase price when determining the respective beneficial interest of the contributors."

[15] Reference is also made, and I adopt, the passages from *Calverley v Green* appearing at p 115-116:

> "The extent of the beneficial interests of the respective parties must be determined at the time when the property was purchased and the trust created. The fact that the mortgage debt was repaid by the appellant is therefore not relevant in determining the extent of the interests of the parties in the land, although it may be relevant on an equitable accounting between the parties. The parties each contributed $9,000 of the amount borrowed, and it appears that the remainder of the price, $9,250, was provided by the appellant, although the evidence on that point is unsatisfactory and there is no distinct finding on the question. If the appellant did provide the whole of the deposit, the respondent's proportionate interest in the land was 9,000/27,250.
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> It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. The purchasers price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed. In this case, the price was $27,250, of which $18,000 was borrowed from the mortgagee by the plaintiff and defendant jointly. The balance was paid by the defendant out of his own funds, being part of the proceeds of the sale of the Mount Pritchard property. Thus the plaintiff and defendant both contributed to the purchase price of the Baulkham Hills property. They mortgaged that property to secure the performance of their joint and several obligation to repay principal and to pay interest. The payment of instalments under the

> mortgage was not a payment of the purchase price but a payment towards securing the release of the charge which the parties crated over the property purchased. We would agree with the view expressed by the English Court of Appeal in Crisp -v- Mullings [1976] EGD 730 at 733, a case in which the material facts are not distinguishable from the present:
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> The situation, in our view, is that the defendant does not establish that he alone provided the purchase price, any more than he would have, had the whole price been provided by a joint mortgage; and the resulting trust of the whole is therefore not established."

[16] A process of equitable accounting is required so as to take into account the payments made by the plaintiff:

(a) as to the mortgage payments - $2,500 per month; and
(b) as to the fact that $105,000 in mortgage payments had been made by the date of trial as indicated earlier in this judgment together with other expenses.

[17] In this regard, I conclude that given the extent of the period of cohabitation and the pooling of assets (nearly 15 months), the circumstances that exist are such that a constructive trust should be imposed. I refer to the judgement of Pincus JA in *Dunn v Turner* [1996] QCA 272 (95/0196). I also refer to the judgment in *Ikeuchi v Liu*, supra at 111 to 118. I find that an appropriate apportionment of a party's respective contribution as to the purchase of the premises in which the plaintiff lived was 60% to the plaintiff and 40% to the defendant.

[18] As to the gifts of money, I am unable to accept the evidence of the defendant for the reasons previously expressed.

[19] The defendant does not assert that the commercial stock acquired was a gift, but rather that she purchased the goods as agent for AEA, the plaintiff's trading company. This is plainly a fabrication which is revealed by the contents of telegraphic transfers, the invoices, the customs documentation, the invoicing of Judy's Auto Parts and the proceedings in the Magistrates Court. There is an inherent improbability of AEA importing documentation for the purposes of cash sale.

[20] I reject the defendant's assertions with respect to the alternators acquired from Taiwan for the sum of $51,431.50. It is highly improbable. For instance, the documentation for the telegraphic transfer bears the defendant's signature and some of the goods ultimately show up on invoices to AEA. Indeed, there is a reference to $66,000 worth of stock on hand in the 1989 profit and loss statements of AEA.

[21] Similarly, I am against the defendant on the question of the catalogues for the business of Judy's Auto Parts, the freight and duty on the alternators from Taiwan ($4,040.27) and the purchase of solenoid switches ($5,380.85).

[22] As to the last of those items, there is no documentary evidence to suggest that solenoids were purchased by AEA and they show up in some of the invoices from Judy's Auto Parts to AEA. The same applies to the payment of duty for parts

($298.33) and the purchase of a computer ($4,338) which was said to be a gift by the plaintiff.

[23] As to the payment on duty for parts ($399.12), there is no evidence from the defendant to show how she paid that duty. I also find that the stock and customer lists from Brian's Rewinds ($1,200) was not incurred by the defendant. I cannot see how there would be any benefit to Brian's Rewinds in respect of AEA.

[24] There remains the purchase of business premises by the defendant. She contends that the $25 000 loan to obtain those premises was a gift. I reject the defendant's claim, and I refer particularly to Exhibit 36. Similarly, I reject the claim for the purchase of carpet at $1,086.79. I cannot accept that the plaintiff purchased carpet for his own business at the same time as the acquisition by the defendant of her business. It follows that the painting, paint and shelving for the business should also be disallowed.

[25] The plaintiff claims a sum of $7,000 for purchase of alternators from Japan. I find that those moneys were advanced by the plaintiff to the defendant because she claims she had insufficient funds to buy the stock from Japan. It was always a loan. It was never a gift. Indeed, there is no record of these alternators in the books of AEA and of the plaintiff. Furthermore, some of the alternators were shown in invoices from Japan as being invoiced to AEA. Accordingly, I find that that sum of $7,000 was a loan and not a gift.

[26] There is a claim for work done by the defendant. The plaintiff contends that he performed work by undertaking "rewinds/exchanges" of various parts which were then sold by the defendant at her business. There is no doubt that he performed some work. He did not keep records because he trusted the defendant. The work was done in his own time.

[27] The records showed that the defendant recorded in her financial work the value of $62,241.50 when applying the 40% discount agreed between the parties. This amounts to $37,344. The value of the work was not in dispute before the trial.

[28] The defendant however contends that such work was done in exchange for her assistance and the plaintiff contends that any work that was done was over a 6 week period and, the defendant, received cash from him for the work done. The plaintiff's cheque book confirms this with a series of cash cheques between late May 1998 through to July. When all of these matters occurred, it must be borne in mind that the parties had separated in July 1999. It is unlikely that there would be such an inimical relationship. As such, I reject the defendant's claim.

[29] There is a claim for a constructive trust on the basis that if the court does not accept that the moneys were made by way of "loan", then in any event, the court ought to impose a constructive trust over the assets of the parties. I am not prepared to do so. See *Baumgartner v Baumgartner* (1987) 164 CLR 137, 148 and *Muchinski v Dodds* (1985) 160 CLR 583.

[30] On the findings I have made, it would be unconscionable for the defendant to retain a benefit in the subject property and to receive benefits from the sale of her business and the business premises without having to account to the plaintiff for any of those

proceeds. In any event on the basis of a restitutionary claim the defendant is clearly shown to have:

(a) derived a benefit;
(b) by reason of the financial payments made on her behalf by the plaintiff; and
(c) the work done for the benefit of the defendant's premises.

[31] The plaintiff has suffered a detriment by the provision of those moneys and it would be unconscionable for the defendant to retain the benefit of those without compensating the plaintiff.

[32] It follows that the plaintiff must succeed in the action. The defendant's claim should be dismissed except for the fact that a constructive trust exists in respect of the house purchased in both names.

[33] I would request counsel to formulate a draft order for judgment in accordance with these findings. Such a draft order should include an order that the defendant pay the plaintiff's costs of and incidental to the action to be assessed on the standard basis. If this is not agreed, it can be argued before me at some future time.