*Smith & Ors v Smith* [2007] NTSC 31

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| PARTIES: | SMITH, ALAN GREGORY<br>WRENN, BETTE NANCY<br>HOLLINGWORTH, NORMA LAURA JOAN<br>THOMPSON, FAYE JEANETTE<br>GARDINER, ROBERT LYNN<br>AND THE BENEFICIARIES OF THE ESTATE OF KELVIN MAURICE GARDINER<br><br>v<br><br>SMITH, ANTHONY JOHN |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | No 81 of 2005 (20515022) |
| DELIVERED: | 10 May 2007 |
| HEARING DATES: | 2, 3, 4 April 2007 |
| JUDGMENT OF: | MILDREN J |

**CATCHWORDS:**

TRUSTS – gift of land to son with life interest by donor over portion of land – presumption of advancement – whether rebutted – life interest surrendered – whether resulting trust – property later sold – son provided alternative accommodation to donor – whether construction trust – motion dismissed with costs

***References:***
*Jacob's Law of Trusts*, 5th ed, Sydney, Butterworths, 1986

***Followed:***
*Hann & Tarner v Linton* (1967) SALSJS 231
*Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134
*In re Kerrigan; Ex parte Jones* 47 SR (NSW) 76

***Referred to:***
*Green v Green* (1989) 17 NSWLR 343
*Hepworth* (1870) LR 11 Eq 10
*Nelson v Nelson* (1994) 33 NSWLR 740; (1995) 184 CLR 538
*The Estate of the Late Smith* [2004] NTSC 15

***Not Followed:***
*McKie v McKie* 23 VLR 489
*Muschinski v Dodds* (1985) 160 CLR 583
*Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | J B Waters QC |
| Defendant: | D Francis |

*Solicitors:*

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| Plaintiff: | Sean Bowden & Associates |
| Defendant: | David Francis & Associates |

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| Judgment category classification: | B |
| Number of pages: | 20 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Smith & Ors v Smith* [2007] NTSC 31
No. 81 of 2005 (20515022)

BETWEEN:

**ALAN GREGORY SMITH**
**BETTE NANCY WRENN**
**NORMA LAURA JOAN HOLLINGWORTH**
**FAYE JEANETTE THOMPSON**
**ROBERT LYNN GARDINER**
**AND**
**THE BENEFICIARIES OF THE ESTATE OF KELVIN MAURICE GARDINER**
Plaintiffs

AND:

**ANTHONY JOHN SMITH**
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 10 May 2007)

[1] In this action, the plaintiffs seek two declarations: first, that since 25 December 1995 the defendant held certain property pursuant to a resulting trust in favour of Marjorie Lillian Nancy Smith (the deceased) and in favour of the plaintiffs as the beneficiaries of the deceased's estate, including the proceeds of the sale of the property on 27 July 1998; and second, that a constructive trust arose in favour of the plaintiffs with respect

to one half of the said proceeds of sale. The plaintiffs also seek consequential relief.

**Facts**

[2] The deceased was born on 22 September 1912. She had seven children by her first husband, whose surname was Gardiner. The deceased's children were each of the plaintiffs, the late Kelvin Maurice Gardiner who died on 7 April 2001 and the defendant. The family lived in Victoria. The defendant is the deceased's youngest child. He was born in about 1951. The deceased and her first husband separated in about 1958 and were subsequently divorced. Later still, the deceased married Arthur Frederick Smith.

[3] In about 1961, the deceased, Arthur Frederick Smith and the defendant moved to the Northern Territory. Kelvin Gardiner was already living in Darwin. The other siblings remained in Victoria.

[4] On 13 November 1968, the deceased and Arthur Frederick Smith purchased a four acre block of land at the 17 Mile, on which they built a house in which they lived and subsequently erected and ran a general store. On 30 January 1972 Arthur Frederick Smith died. Thereafter the running of the store was taken over by Kelvin Maurice Gardiner and his family. I am unable to make any finding as to whether or not Kelvin paid anything for the business. According to the evidence of Alan Gregory Smith ("Alan Smith") he made enquiries and found that there was an insurance policy held by the deceased on the life of Arthur Frederick Smith which would result in a

payment of $13,000 to $14,000. There is no satisfactory evidence as to the existence of this policy or its value.

[5] On 31 October 1973, the deceased sold the land for $31,100.00. There was at that time a mortgage to Custom Credit Corporation Limited which was discharged at the time of settlement. There is no evidence before me as to the amount owing at the time of the sale, nor of the net amount of the proceeds of sale received by the deceased.

[6] After the sale, the deceased obtained employment as a cook at Carpentaria College, Nightcliff. She also moved into a caravan which she owned and which was situated on the school grounds.

[7] In 1973, the deceased purchased a five acre block situated at 35 Beardwood Road, Humpty Doo (the Humpty Doo property) on which was erected a three bedroom house (the house). The purchase price for the Humpty Doo property was $13,500. The transfer indicates that it was executed by the vendor on 10 October 1973. For some unknown reason, the sale was not completed until 3 December 1975 when the transfer was registered. No mortgage was registered over the Humpty Doo property so the deceased had sufficient funds of her own to eventually complete the sale. It is not in dispute that the deceased moved onto the Humpty Doo property in 1974, prior to Cyclone Tracy which devastated Darwin on 25 December 1974.

[8] It is not in dispute that at the time when the deceased moved into the Humpty Doo property the house was in an unfinished state. At this time

Alan Smith lived at Byrne Circuit, Moil and he visited the property several times before the cyclone. The defendant was a fireman living in a government house in Wanguri. The evidence of Alan Smith and of the defendant differs slightly in detail as to what was needed to finish the house. I will deal with this subject in more detail later. To the extent that there are differences, with some minor exceptions, I prefer the evidence of the defendant because he arranged for the house to be completed after the cyclone. The evidence is that the house was not damaged by the cyclone, except that a few sheets of iron on the roof became loose and it was necessary for the defendant to replace some nails with screws.

[9] Following the cyclone, the defendant's house was destroyed from the floor boards up. The defendant says that he made some temporary repairs to his house and he, his wife and children continued to live there in rough conditions, there being no electricity or water. The defendant became concerned as a result of his own experiences that his mother was living alone on the Humpty Doo block which also had no power or water other than a rain water tank. By this time, and possibly even before then, the deceased's only income was the old aged pension. The defendant's evidence is that in January 1975 he entered into an oral agreement with the deceased the terms of which were that the deceased would transfer ownership of the Humpty Doo property to him, that she would retain a small living area around the house for herself and that he would upgrade the house to a reasonable living standard at his own expense. It was also agreed that he

would eventually build a new house for himself and his family on the block and that after the block was transferred to him, he would meet all of the outgoings in respect of the property. He also said that it was agreed that she could live in her house and living area for the rest of her life.

[10] Following this agreement the defendant began to carry out the work needed to finish off the deceased's house, and he initially paid for the cost of this work from his own resources. In late 1975 the defendant and the deceased consulted a solicitor in order to formalise the arrangements between them. As a result of advice given by the solicitor, the Humpty Doo property was transferred to the defendant "in consideration of the natural love and affection borne by me for my son Anthony John Smith of … etc…, and the payment by him to me of the sum of ONE DOLLAR ($1.00)…" At the same time the defendant granted to the deceased a lease for life in registrable form for an annual rental of $1.00, payable if demanded, over an area of 600' x 233' occupying the front left corner of the block as viewed from the street frontage (the deceased's area). The deceased's area amounted to approximately 25 per cent of the total area of the block. The transfer and lease were both registered on the title on 3 December 1975. It is likely that not all of the "finishing off" was completed by then, because the defendant needed to borrow money to complete this work. At some stage, possibly after registration of the transfer, the defendant sought a loan for this purpose from the Bank of New South Wales. The bank agreed to lend the money, but only on condition that the deceased surrendered her lease so that it could

register a mortgage in order to secure the loan in priority to the leasehold interest.

[11] The defendant's evidence was that he approached his mother about this and that she agreed to it, although she could continue to have the right to occupy the deceased's area for the rest of her life.

[12] On 17 February 1976 the deceased's surrender of her lease was registered. The mortgage is in evidence as annexure AGS3 to the witness statement of Alan Smith (Ext P2), but provides no information as to the amount of money lent or to be lent. The defendant's evidence is that he cannot now remember how much he borrowed, but he said that the whole sum was spent on improvements to the house and "associated improvements for her benefit around the Humpty Doo block"; and in addition he expended $5,000 he received from the Cyclone Tracy Fund, as well as monies from his own savings. I accept this evidence.

[13] As to the works carried out by the defendant I find that the defendant paid for or he himself performed the following works in 1975-1977:

(a) screwed down some screws on the roof to replace loosened nails. I accept Alan Smith's evidence that the whole roof was not screwed down;

(b) installed ceiling battens and ceilings throughout;

(c) installed wiring throughout the house for fans, light switches and the fuse box;

(d) installed fans, light switches and the fuse box;

(e) constructed the front and rear verandas;

(f) constructed carports at both ends of the house;

(g) supplied and fitted soffit linings to the eaves of the house;

(h) purchased and installed a bore and a pump and the necessary piping to provide water to the house;

(i) purchased and installed a 6 kva diesel generator to supply electricity to the house;

(j) constructed and fitted out a 30’ x 16’ in-ground swimming pool adjacent to the house together with all necessary filters, pumps, piping, etc;

(k) purchased and installed locks on the bedrooms, bathroom and toilet doors;

(l) installed internal and external fencing to the entire property except for the front fence posts and brick gate supports;

(m) paid for the fee for the connection of electricity to the property when electricity became available in the area; and

(n) constructed a concrete walkway around the pool.

[14] The defendant's evidence was substantially supported by the evidence of Brian Thomas Muir, who also gave evidence that he was a painter by trade and that he painted the house both externally and internally; by the evidence of John David Hickey who drilled the bore and supplied the casing; and by Ronald Thomas Riddle who constructed the pool. I have no reason to doubt any of this evidence. No evidence was called as the amount of money the defendant had expended on his mother's house and living area. No attempt was made to call evidence as to the value of these improvements either then or at any later relevant time by either party.

[15] In approximately 1977 the deceased married one Walter Burns and they resided in the house until they separated not long afterwards. Thereafter the deceased continued to live in and occupy the house and the deceased's adjacent area until 1998.

[16] In 1978 Alan Smith, his wife and children lived in the house with the deceased for a few months.

[17] In 1980 the defendant had plans approved to build a three bedroom house on the block. The house was built during 1980-1981. For a few months, whilst the house was being constructed, the defendant's daughter, Linda, who was then aged 10 or 11, moved in and stayed with the deceased until the defendant's house was completed. The defendant borrowed further monies from the bank, secured by the same mortgage, in order to build the house.

[18] In approximately 1983 or 1984, the defendant built a one bedroom block home with kitchen which adjoined a shed he had erected about one year before. This home was occupied from time to time by mutual friends of the defendant and the deceased rent-free, except for a contribution towards power costs. For a few months this home was also occupied by a paying tenant. The defendant said that he used the rent towards meeting the out-goings on the property.

[19] In 1985 the defendant and his nephew Assan Gardiner, purchased a large block of land, some 230 acres, at Lot 161, Heather's Lagoon Road, Lake Bennett (Lot 161) for $27,000. The land was unimproved. Subsequently, the defendant purchased Assan's share. Over a period of time thereafter the defendant improved Lot 161 by installing fencing, a bore and installing a house on stumps which he had purchased and removed from Darwin. It is not clear on the evidence precisely when this house was finished, but the defendant's evidence was that his mother often went with him to visit the property.

[20] In about 1996 the deceased expressed a wish to move to that property. The defendant built another house on Lot 161 at a cost of almost $70,000 for her exclusive use. He also built her a spa. After this house was completed the defendant sold the Humpty Doo property for a net sum of $215,528.85. He also gave the deceased $20,000 out of the proceeds of the sale. The defendant maintained that the deceased wanted to move to Lot 161, that she was happy to do so, that she was not pressured in any way to move and that

she understood that she would have the right to live in the new house for the rest of her life. He maintained that the $20,000 he gave her was a gift for her to use as she pleased and that there was no obligation upon him to pay the deceased anything out of the proceeds, because the arrangements between them had been changed with her full understanding and consent. At the time of the sale on 1998, the deceased was aged 86, but was in good mental and physical health.

[21] The deceased continued to reside at Lot 161 until shortly before her death on 2 July 2001. Due to failing health, approximately six weeks prior to her death, the deceased moved to a property at Palmerston owned by the defendant where she was cared for by the defendant's wife and her daughter, Bette Wrenn, and other family members.

[22] On 23 January 2001 the deceased made a will. The will is in handwriting using a printed will form. It was made without the defendant's knowledge, whilst he was in Melbourne. The deceased appointed the defendant to be her sole executor. The terms of the will were brief: "I give devise and bequeath all my personal possessions to my family as arranged by me and known to my executor". On the application of the plaintiff Alan Smith, this Court declared the will to be invalid: *The Estate of the Late Smith* [2004] NTSC 15. No letters of administration have yet been taken out.

[23] During the whole of the period after the transfer of the Humpty Doo property, the defendant met all of the outgoings of both the Humpty Doo

property and Lot 161. He also gave to the deceased a second hand car after they moved to Lake Bennett. He also paid for the contribution for sealing Beardwood Road and paid for her airfares for a trip to Scotland. There is no evidence that the deceased made any financial contributions towards the Humpty Doo property or Lot 161 other than paying for her own electricity which was separately metered and the original purchase price of the Humpty Doo property.

[24] There is evidence that the deceased did not tell any of the plaintiffs about the true arrangements between her and the defendant concerning the Humpty Doo property. Alan Smith claims that the deceased told him in 1976 or 1977 that she had put the Humpty Doo property into the defendant's name so that he could use the property as collateral to raise a loan to build a home for himself on the property. If this is what she said, this was nowhere near the whole truth. Alan Smith was also given certain information in about 1998 concerning the proceeds of the sale of the Humpty Doo property by his sister Bette Wrenn, which caused him to speak to the deceased about that subject. He claims that the deceased told her, in the absence of the defendant, that "Tony was holding $100,000 for her and that he was doing this so it would not affect her pension". I have admitted this evidence as evidence of the subjective attitudes or beliefs of the deceased, but not as evidence of the truth of matters therein stated: see *Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134 at 137-138; at 149-150. Evidence was also given by Esther Fitzpatrick who

recounted a similar conversation she had with the deceased in about 1998; and also by Bette Nancy Freebody (formerly Wrenn). I accept that this is what the witnesses were told but there is no admissible evidence that this arrangement existed in fact. There is another plausible explanation as to why the deceased would have told this story and that is that she did not want the rest of the family to know the real truth for fear of pressure being put on her and the defendant by the plaintiffs to alter the existing arrangements and the likely unpleasantness that this might cause. The fact that there were no open discussions between the deceased and all of her children, no letters or other writings (even though she kept diaries) explaining the purpose of the original transfer, the grant of the life estate over only a small portion of the Humpty Doo block, the surrender of the lease for no consideration and the circumstances of the ultimate sale indicates strongly that she was deliberately concealing the truth. The terms of her will and the circumstances under which it was made give further support to this inference. In her will, she clearly reposed all of her trust in the defendant and was not prepared to spell out who was to receive any part of her estate except as “arranged by me and known to her executor”. At no stage did she ever complain to anyone that she was dissatisfied with the arrangements entered into, whether formally or informally with the defendant. Further, the evidence is all one way that the deceased was a strongly independent woman who lived an active life until shortly before her death. There is not the slightest suggestion that the deceased was affected mentally by her

advancing years. I note also that she told her granddaughter, Linda May Hedge (who was 12 years old at the time), that "Everything is in your Dad's name because that's how I wanted it". I accept Mrs Hedge's evidence. I found her to be an honest and convincing witness. I therefore do not find that the deceased entertained any expectation in her mind that she was entitled, if she demanded it, to $100,000 out of the proceeds of the sale of the Humpty Doo property. The evidence of these conversations is therefore irrelevant to any of the issues I have to decide.

[25] Whether or not the deceased had a special love for the defendant, the evidence is that she remained close to and affectionate towards each of her children and her many grandchildren. There is no doubt that she remained very active, doing her own gardening, sewing and housework and she drove her car until shortly before her death. She frequently looked after her grandchildren. She kept ducks and fowls and would provide eggs to the defendant as well as to various pensioners, family members and friends in the Darwin area. She occasionally looked after the defendant's children when they were young and their parents were not at home and supervised the pool whenever children were using it. She helped clean the pool, raked around the garden, mowed the lawns in her area, helped watering mango trees planted over the Humpty Doo property before the defendant installed a reticulation system and was a close companion to the defendant and his family. She also did her own housework, washing and ironing as did the defendant and his wife. The relationship was what one would expect in the

circumstances between a mother and her son and family living together on the same block. At the time the Humpty Doo property was prepared for sale, she assisted in making the property presentable. On the other hand, the defendant and his family did most, if not all, of the general maintenance and upkeep of the rest of the block.

**The plaintiff's standing to sue**

[26] I raised with the parties the plaintiff's standing to bring this action as it seemed to me that the proper plaintiff was the administrator of the deceased's estate. I was informed that no administrator had yet been appointed, although Alan Smith had sought letters of administration in other proceedings still pending before the Court. I was also advised by the parties that the defendant did not challenge the plaintiff's standing to seek the relief sought and that the defendant had already given an undertaking to this Court not to raise any objection of this kind. Counsel for the defendant referred me to *Jacob's Law of Trusts*, 5th ed, Sydney, Butterworths, 1986, at para 2318 where the learned authors refer to the right of a beneficiary to bring a personal action against an overpaid beneficiary or a stranger volunteer and the claim is not liable to be defeated merely because of the absence of administration by the Court.

[27] However, it is common ground that to the extent that a resulting or constructive trust arose, it arose in favour of the deceased, with the result that any recovery made would fall to be distributed amongst all of the

beneficiaries of the deceased's estate as on an intestacy and that this would include the defendant.

[28] In these circumstances I see no reason why the plaintiffs lack standing to seek relief of the kind sought in the statement of claim.

**A resulting trust?**

[29] The first question is whether a resulting trust arose by virtue of the original transfer of the Humpty Doo block and the grant of a life estate over a portion of the block to the deceased on 3 December 1975. The instrument of transfer specifically provides that the transfer is made "in consideration of the natural love and affection borne by me for my son Anthony John Smith of … etc.., and the payment to him by me of the sum of ONE DOLLAR ($1.00)…" The presumption of a resulting trust does not ordinarily arise where property is transferred to a child of the donor for less than a proper consideration. This is the case even if the donor is the mother rather than the father of the child: *Nelson v Nelson* (1994) 33 NSWLR 740; (1995) 184 CLR 538 at 548-549, 574, 585, 601; and even if the child is not in need of the parent's support: *Hepworth* (1870) LR 11 Eq 10. However, these presumptions can be rebutted by evidence. In this case, the evidence is clear that the gift of the property to the defendant was made in the expectation that he would bring the deceased's house up to a proper living standard and upon the defendant meeting all of the outgoings and granting to her a life estate over a portion of the property. This is evidenced by the terms of the

transfer and of the registered lease for life, the fact that the finishing off was done to the deceased's house and that there is no evidence to suggest that anyone other than the defendant carried out those works or paid for any of the outgoings. The subsequent surrender of the lease by the deceased and the registration of the mortgage to the Bank of New South Wales is consistent with the carrying out by the defendant of the obligations he undertook which were by then incomplete. In my opinion, the deceased surrendered her lease only to enable the defendant to raise the finance needed to complete his promises to her. There was no intention by the deceased to make an absolute gift of the whole property to the defendant, as clearly the deceased and the defendant intended that she would retain a life interest in the leased area and would continue to meet the outgoings over the whole property. To this extent, the presumption of advancement is rebutted and there was either a resulting trust or constructive trust in favour of the deceased as to so much of the land over which she held a lease for life once she surrendered her lease. In arriving at this conclusion I prefer the analysis of Bray CJ in *Hann & Tarner v Linton* (1967) SALSJS 231 at 236-237 and of Jordan CJ in *In re Kerrigan; Ex parte Jones* 47 SR (NSW) 76 at 82-83 than the decision of the Victorian Full court in *McKie v McKie* 23 VLR 489; see also *Napier v Public Trustee (Western Australia)* (1980) 32 ALR 153; and *Muschinski v Dodds* (1985) 160 CLR 583. To the extent that the defendant might have failed to have met his other obligations under the arrangements, this would have given rise to a claim in equity for equitable damages in favour of the

deceased, but as the evidence shows that the defendant met his obligations throughout, no such debt has been established.

[30] As to the sale of the property in 1998, the deceased surrendered her equitable life interest on the understanding that a house would be built for her by the defendant on Lot 161 in which she could live rent free for the rest of her life, he meeting all of the outgoings. I consider that the presumption of advancement in the surrender of her remaining equitable interest in the Humpty Doo property, which was then of little value given her advanced age, is rebutted, but that it gave rise at best to a trust in equity over the Lake Bennett property in the nature of a life interest over the portion of the land she occupied as her new home, or at worst to a claim in equity reflecting the value of her life interest. The suggested equitable interest expired with her death in 2001 and as the defendant gave the deceased $20,000 out of the proceeds of sale this was adequate to repay any equitable claim had one arisen. There is therefore no interest in the Lake Bennett property left for the benefit of the deceased's beneficiaries and no amount due to the estate.

**Constructive trust**

[31] The main thrust of the plaintiff's case was that the circumstances gave rise to a constructive trust in favour of the deceased to the extent of the contributions that the deceased and the defendant made to the acquisition of and improvements to the Humpty Doo property and that this trust arose irrespective of the actual intentions of the parties.

[32] The leading authority is *Muschinski v Dodds* (supra); in particular the judgment of Deane J. At p 613, his Honour said:

> "Like expressed and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court. It differs from those other forms of trust, however, in that it arises regardless of intention."

[33] At p 614, his Honour said:

> "Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) 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."

[34] At p 615, his Honour said:

> "The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice.
>
> As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundations of such principles…"

[35] The difficulty for the plaintiffs in this case is that there is no evidence that the deceased improved the property by making financial contributions other than the original purchase price, or by her personal exertions on the property or in any other way. The circumstances of this case are not analogous to cases involving claims by a de facto partner to a share of a property jointly occupied over a long time. There is no evidence that the deceased performed

services for the defendant or his family which might give rise to such a trust. To the limited extent that the deceased made contributions to the defendant of a domestic kind, it was no more than would be expected in the circumstances of a mother living next door to her son and his family and, in any event, the contributions of this kind were mutual. It is true that the deceased spent time and labour doing some painting to the house she occupied and tidying her yard in order to present the part of the property she occupied in the best light for the approaching sale in 1998, but that did not give rise to any expectation on her part that she would be reimbursed for her efforts. Likewise, she was put to the inconvenience of packing up her personal belongings in order to shift to Lake Bennett. Had the defendant not fulfilled his undertaking to her to provide her with a separate dwelling on the Lake Bennett property in which she could live for the rest of her life, the fact that she did this work and surrendered her right to live on the Humpty Doo property might have given rise to a trust in equity in the Lake Bennett property as for a life interest over a portion of the property as she would have acted to her detriment: see, for example, *Green v Green* (1989) 17 NSWLR 343 at 357 per Gleeson CJ with whom Priestley J agreed. However, the defendant fulfilled his part of the bargain. This is not a case where the deceased acted to her detriment and the defendant took unconscionable advantage of the deceased, because the deceased got what she expected to get. There was no joint endeavour which failed. There is simply no evidence that the defendant at any time acted unconscionably and there is no basis

upon which the Court can therefore declare a constructive trust existed in favour of the deceased either in 1998 or at the time of her death.

[36] In these circumstances, the relief sought by the plaintiffs must be refused and the action dismissed with costs.

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