

30/5/08

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN
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Cause No: D16 OF 2006

7 BETWEEN: SB-H
8

APPLICANT/PETITIONER

9 AND:
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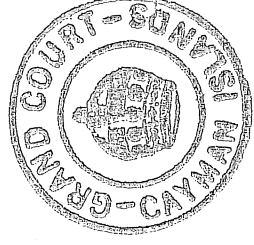
JSH

RESPONDENT/DEFENDANT

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16 Appearances: Mrs. Eileen Nervik of Nervik & Company
17 for the Applicant/Petitioner
18 Mr. Shaun McCann of Campbells for the
19 Respondent/Defendant

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21 Before: Hon. Justice Henderson
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23 Heard: May 30, 2008
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RULING

29 The petitioner, Mrs. B-H, has requested a reconsideration of an earlier ruling on costs
30 by Acting Justice Sanderson of this court. The circumstances require some
31 explanation.

32 On Monday, October 30th, 2006, Judge Sanderson conducted a hearing in this matter.

33 A transcript of the evidence given by the respondent, Mr. H, at that hearing is before
34 me.

35 At pages 27 to 35 inclusive, Mr. H was cross-examined in some detail on the subject
36 of real estate purchases. He was asked about condominium #208, at the Carenage

1 Development in Grand Harbour. He denied categorically that he had any interest in
2 that unit. He said:

3 "No, My Lord, I don't have any interest other than the fact that it is one of my clients
4 who is purchasing that unit who we act on behalf of."

5 In the next question he said he thought that the client had put the land "into a third
6 party developer as part of the company". He again denied (a little later on) that he has
7 ever been involved in real estate transactions "for or on behalf of myself" in relation
8 to the Grand Harbour properties. He denied the use of any matrimonial funds with
9 respect to the Grand Harbour properties. Again, at page 32 he was asked about his
10 interest in unit 208. He replied at line 17:

11 "A. The interest I have in that unit is I represent the purchaser of that unit, and we
12 have put the deal together with the purchaser of the unit with the developer, which I
13 think is a company called Careenage [Development] Limited."

14 He identified the purchaser as a Mr. John Bonner.

15 Finally, at page 35 he said:

16 "A. ... the relationship I have with Mr. Bonner, in this particular instance with him
17 being off island is that he has interest in Cayman Grand Harbour generally. He's
18 reserved a lot in Cayman Grand Harbour, as well as this particular unit, which I
19 presented to him when it came on the market. Since he's not on island, he's unable to
20 do these things himself. And the basis upon which he moved forward with the
21 purchase was that we would provide certain services for him, which included in this
22 occasion -- the redesign of the unit to meet his requirements and specifications."

1 The point was pressed. Ms. Nervik said:

2 "Q. Mr. H, I'm putting it to you that this is -- you are the purchaser. And if this was
3 an up and front arrangement with the client, why did you not disclose it in your
4 affidavit? You said you had absolutely no dealings."

5 The response was:

6 "A. Well, if you read my affidavit to mean that I don't have any dealings in any
7 property in Cayman Grand Harbour, then -- then I apologise. That was not the
8 intention of the affidavit. Because I'm actually listing agent for every property in
9 Grand Harbour. So along with this particular client, we also have numerous other
10 clients that we are dealing with and working with on the development as a whole."

11 Careenage is a separate development from Grand Harbour itself.

12 In fact, a deposit for the purchase of unit 208 was provided to the vendor by a cheque
13 in the amount of US \$38,000, prepared by Mr. H on August 22nd, 2006. That cheque
14 was drawn on the account of International Relocation Group Ltd, a Cayman Islands
15 company in which Mr. H owned 40 per cent of the shares and Mrs. B-H owned 60 per
16 cent. A second cheque dated September 21st, 2006 for the balance was issued to the
17 vendor by Mr. H. This cheque was in the amount of US \$351,402. Again, it was
18 drawn on the account of International Relocation Group.

19 Mrs. B-H was unaware that either of these two cheques had been issued by a company
20 in which she owned the majority interest. None of that was disclosed to Judge
21 Sanderson in the persistent questioning from which I have quoted earlier.

1 The explanation is that throughout the marriage, as a practical matter, the couple
2 treated International Relocation Group Ltd as Mr. H's asset. His business was real
3 estate. Mrs. B-H was largely engaged in the practice of law; however, as a
4 Caymanian, she took a 60 per cent interest in International Relocation Group because
5 Mr. H was prohibited by law from owning a majority interest in it. This, says Mr. H,
6 justified him in using \$400,000 of the company's assets well after the couple
7 separated without disclosing to his wife that he had done so.

8 He says that he was loaning the money to his client, Mr. Bonner. One might question
9 whether it is any part of the job of a real estate agent acting as such to lend the
10 purchase monies to a client. In any event, Mr. H says that Mr. Bonner was acquiring
11 the beneficial interest and Mr. H was simply loaning to Mr. Bonner the wherewithal
12 to do that. It is unclear why Mr. Bonner required a loan for 100 per cent of the
13 purchase price to purchase this unit. No interest was being charged on the loan, so it
14 is equally unclear what economic benefit from the loan would flow to the company.

15 Mr. H says that there was a benefit of a sort by selling a unit. He could portray to
16 other potential purchasers the fact that there was interest in the development if
17 someone had already bought a unit.

18 Shortly after the evidence was given (without any revelation of any of these
19 explanatory details) Mr. H says that Mr. Bonner changed his mind. Mr. Bonner
20 decided he didn't want the unit so Mr. H, who had paid for the unit, then took title.
21 That, says Mr. H, does not render his evidence given on October 30th, 2006 false
22 because as at that date he thought that he had no beneficial interest in the property.

1 It will come as no surprise that I find these circumstances suspicious. Whether this
2 was truly a purchase for Mr. Bonner or truly a purchase for Mr. H cannot be resolved
3 without oral evidence in cross-examination. However, I can say from what I have
4 heard that the details should have been disclosed to Judge Sanderson during the cross-
5 examination of Mr. H as they might well have been relevant to His Lordship's
6 decision.

7 In addition, they should have been disclosed to Mrs. B-H prior to the hearing and,
8 indeed, the money should not have been removed from the company without her
9 express consent. Whatever may have been the arrangement between the couple prior
10 to separation concerning International Relocation Group Ltd, the fact of separation
11 would certainly suggest that a more formal approach to the assets and affairs of that
12 company needed to be taken.

13 I consider this an egregious example of failure to disclose, in a bitterly contested
14 matrimonial proceeding. I consider that the failure had the potential to prejudice Mrs.
15 B-H in the presentation of her case, and it prevented the learned Judge from having all
16 of the relevant facts before him.

17 These are good reasons to set aside the previous order as to costs (which Judge
18 Sanderson indicated could be reopened if new evidence became available). The
19 transcript (at page 153) contains the brief submissions made on costs before Judge
20 Sanderson. His reasons, in part, read as follows:

21 "Mr. H said in his evidence that the only transaction that he had was on behalf of a
22 client, that he had none personally. He identified the client in question and the
23 document has been produced.

1 "So the application in respect of that is dismissed with liberty to apply should any new
2 evidence become available."

3 In reference to a different transaction he said:

4 "With respect to the question of costs, there was divided success."

5 He awarded the respondent one half of the costs of the day and left the remaining one
6 half of the costs in the cause.

7 The material non-disclosure to which I have referred justifies my setting aside that
8 order, which I now do, and substituting the following order:

9 Mr. H is to pay to Mrs. B-H the costs of the hearing before Judge Sanderson and the
10 costs of this hearing before me, on an indemnity basis, forthwith and in any event of
11 the cause.

12 Dated this 30th day of May, 2008

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14 *Henderson, J.*

15 Henderson, J.
16 Judge of the Grand Court
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