16/4/08

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 352 OF 2005

IN THE MATTER OF SECTION 77 OF THE REGISTERED LAND LAW (1995) REVISION

AND IN THE MATTER OF AN APPLICATION BY CIBC CAYMAN LIMITED AS CHARGEE OVER CERTAIN CHARGED PROPERTY FOR ORDERS DIRECTING THAT THE PLAINTIFF BE PERMITTED TO SELL THE PROPERTY CHARGED BY THE DEFENDANTS TO THE PLAINTIFF BY WAY OF PRIVATE TREATY

BETWEEN:	**CIBC CAYMAN LIMITED**	**PLAINTIFF**
AND:	**RICHARD CHRISTIANSEN**	**FIRST DEFENDANT**
AND:	**ELAINE CHRISTIANSEN**	**SECOND DEFENDANT**

Appearances: **Ms. Sandie Corbett of Walkers for the Plaintiff**
Mr. Scott Wilson of Diamond Law Associates for the First Defendant
Mr. Graham Hampson instructed by Sheri Bodden of Bodden & Bodden both for the Second Defendant

Before: **Hon. Justice Henderson**

Heard: **March 17, 18 and 19, 2008**

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

The plaintiff bank ("the bank") seeks certain declaratory orders intended to assist it in enforcing its security over four parcels of land. The defendant Richard Christiansen is the registered proprietor of all four parcels. The two defendants are married and live in a

home on the largest parcel ("parcel 126"). The defendant Elaine Christiansen claims an overriding interest in each of the four parcels which if recognized, would rank in priority to most of the bank's charges and would prevent the bank from foreclosing. Most of the relevant facts are not in dispute.

Chronology

Prior to his marriage to Mrs. Christiansen, Mr. Christiansen granted a charge in favour of the bank over his home on parcel 126 in the amount of CI $200,000.00. The amount of the charge was increased to $300,000.00 and then $350,000.00.

On December 24, 1995 the two defendants were married. At this time, Mr. Christiansen was sixty-five years of age and Mrs. Christiansen was thirty-five. Mr. Christiansen was (and is) the owner of Quarry Products Ltd., which was at that time a flourishing business; he was a man of substance and standing in the community. Mrs. Christiansen, a recent arrival on Grand Cayman, had come here from California and was working as a waitress at the Wharf Restaurant. She had been the victim of an unfortunate foreclosure in California and was in financially straitened circumstances.

The two defendants were frank in their oral evidence: their marriage was a result of a bargain. Mr. Christiansen promised his prospective wife financial stability for life; he told her she would never have to work again because he would support her financially for the rest of her life. In particular, he told her that the fact of their marriage would result in Mrs. Christiansen acquiring a ½ interest in what was to become the matrimonial home.

Mrs. Christiansen accepted this offer. She undertook to be responsible for all of the domestic arrangements – cooking, cleaning, renovating, entertaining, etc. – in the home.

The bargain the couple entered into was of fundamental importance to Mrs. Christiansen. She had numerous conversations with her husband, both before and after marriage, in which the terms of the agreement were repeated. There was no ambiguity: Mr. Christiansen asserted consistently that his wife now owned, as of the date of marriage, a ½ interest in the matrimonial home.

As time passed, Quarry Products began to fail. It was necessary for the company and its owner to borrow substantial sums to keep the business afloat. On numerous occasions after his marriage, Mr. Christiansen increased the borrowing under the first charge on the home and granted second, third, and many collateral charges over the various parcels. He had extensive dealings with the bank. At no time did he reveal to the bank that he had granted to his wife a ½ interest in the home which the bank looked to as its primary

security. On a number of occasions, he misrepresented to the bank and others the state of ownership.

Mr. Christiansen never discussed his borrowing with his wife. I am satisfied she knew nothing about it. Had he revealed to her that he was charging the matrimonial home to secure his business debts, she would have objected strongly to the jeopardy in which this placed her interest in it. She had no notice of any of the charges on the home subsequent to marriage until the bank began its attempt at foreclosure.

When Mrs. Christiansen was asked in cross-examination why she never requested that her interest be registered on title, she said she did not want that because she was afraid that it would render her liable for her husband's borrowings. She did not however, take any active step at any time to conceal her ownership from the bank.

The bank was aware that Mr. Christiansen had married and was living with his wife in the matrimonial home but made no inquiry about the possibility of an overriding interest. The bank appears to have been blissfully unaware of the evolution of the law with respect to overriding interests arising through actual occupation of a matrimonial home. It is the author of its own misfortune. It has overlooked the warning from Lord Wilberforce in *Williams and Glyn's Band v. Boland* [1981] AC 487 (HL):

> "What is involved is a departure from an easy-going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so. To substitute for this a practice of more careful enquiry as to the fact of occupation, and if necessary, as to the rights of occupiers can not, in my view of the matter, be considered as unacceptable except at the price of overlooking the widespread development of shared interests of ownership."

Eventually, in May 2004, the bank commenced the sequence of steps necessary to a foreclosure. Over a year later, in July 2005, Mrs. Christiansen asserted her overriding interest. Even then, her interest was asserted only in a cursory and conclusory manner in her pleading. On the first day of this hearing, I granted leave to Mrs. Christiansen to substitute a more detailed and amended counterclaim for her earlier pleading. Her oral evidence at the hearing (and that of her husband) was the first detailed account of their bargain to be placed on the record.

Law

Section 28 of the *Registered Land Law* (2004 Revision) mirrors its English counterpart and reads:

> "Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
>
> ...
>
> (g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where enquiry

is made of such person and the rights are not disclosed;

...

Provided that the registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit."

There is no dispute that Mrs. Christiansen has been a person in actual occupation of the matrimonial home on parcel 126 at all times subsequent to the original charges totalling $350,000.00. The bank made no inquiry of her; therefore, neither her husband's intentional concealment of their bargain nor her failure to take steps to disclose it can be held against her. She is entitled, according to the letter of the legislation, to have any equitable interest in the home recognized as an overriding interest.

It has never been suggested that Mrs. Christiansen has made any financial contribution to the acquisition of the home or to its upkeep. The case for the defendants is based upon the existence of an express agreement and, in the alternative, a common intention.

The bank did not concede that there was an agreement but was able to offer little in opposition to the sworn evidence of the defendants. Although the credibility of her husband is much diminished by the misrepresentations he has made over the years about the ownership of the home, Mrs. Christiansen's credibility is unimpeached. I observed her carefully as she gave evidence. Her narrative is entirely plausible and, I find, truthful.

I am satisfied that the two defendants did, as she asserts, enter into an express agreement to transfer a ½ interest in the home to Mrs. Christiansen.

Although the finding I have just made makes it unnecessary to say so, I am satisfied also that Mr. and Mrs. Christiansen have had, since the date of their marriage, a common intention that Mrs. Christiansen should enjoy a ½ interest in the matrimonial home.

This is not the sort of case found in *Gissing v. Gissing* [1971] 886 (HL) or *Williams and Glyn's Bank Ltd. v. Boland et al., supra*, because the claim of Mrs. Christiansen is not based upon any financial contribution by her. Rather, it is decisions such as *Lloyd's Bank PLC v. Rossett et al* [1990] 1 All E.R. 1111 (HL); *Hammond v. Mitchell* [1991] 1 WLR 1127 (Family Division); and *Stack v. Dowden* 2007 UK HL 17 which provide the necessary guidance.

The judgment of the House of Lords in *Lloyd's Bank, supra*, was delivered by Lord Bridge in these terms:

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between

> the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to each [reach] such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do." (at pages 1118 – 9)

Mr. and Mrs. Christiansen reached an agreement that the matrimonial home was to be shared beneficially between them. The agreement was reached well after the acquisition of the home; it crystallized on the date the parties were married. Lord Bridge uses the word "exceptionally" in reference to the court's willingness to recognize a constructive trust based on an agreement entered into subsequent to acquisition of the home. There is no analysis, in *Lloyd's Bank* or in any other case cited by counsel, which explains why such a recognition should be exceptional. Nothing was urged in argument by counsel which would shed any light on this qualification. For myself, I find it difficult to discern why the result should be different when the agreement is entered into subsequent to the acquisition of the home. In any event, I am satisfied that the agreement entered into by Mr. and Mrs. Christiansen is well within the ambit of what is contemplated in the quoted passage.

The agreement between Mr. and Mrs. Christiansen has never been reduced to writing; that will not prevent a finding that the agreement gave rise to a constructive trust once it is shown that Mrs. Christiansen acted to her detriment or significantly altered her position in reliance on the agreement. In her oral evidence before me, Mrs. Christiansen was adamant that she would not have relinquished her position at the Wharf Restaurant and her career goals in the restaurant industry but for the promise of a ½ interest in the matrimonial home. Whether or not this amounts to acting to her detriment, it is a significant alteration of her position. I am satisfied also that she altered her position by resigning her employment in reliance upon the promise made to her by her husband.

It follows that the agreement between the parties gives rise to a constructive trust of a ½ interest in the home in favour of Mrs. Christiansen. That is an equitable interest which is elevated, by section 28 of the *Registered Land Law*, to the status of an overriding interest. As a consequence, that the bank's charges which were created subject to the date of marriage cannot be enforced in such a way as to diminish her equitable interest, and Mrs. Christiansen is entitled to a declaration to that effect.

There remains the question of whether the overriding interest attaches to any of the parcels (parcel 127, 128 and 130) other than the parcel (126) containing the matrimonial home. Mrs. Christiansen's amended counter-claim asserts that the oral agreement entered into at the time of marriage applied to all four parcels; she says that her husband promised her a ½ interest in all four parcels on that date. That cannot be so. Although

the Christiansen's were making use of these parcels by that time, Mr. Christiansen acquired legal title to parcels 127, 128 and 130 only in 1997.

The three parcels are all small: parcel 127 is 0.04 acres, parcel 128 is 0.05 acres and parcel 130 is 0.07 acres. It appears that the driveway to the house is on parcel 128 and part of parcel 127. Mrs. Christiansen has been doing some gardening on these parcels although there was little detail about that given in her evidence. The three parcels have little value on their own; they form a natural adjunct to parcel 126. Mrs. Christiansen has testified that her husband's promise to her was made repeatedly over the course of time. It is more probable than not that he promised her a ½ interest in these three small adjoining parcels subsequent to their acquisition in 1997. I am satisfied that Mrs. Christiansen is the beneficiary of a constructive trust of a ½ interest in these three smaller parcels also and is entitled to a declaration to that effect.

The parties may speak to costs if they are unable to agree.

Dated this 16th day of April, 2008

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS