

**IN THE COURT OF APPEAL
TURKS AND CAICOS ISLAND
CIVIL**

CL-AP 14/2017

**ATTORNEY GENERAL
TURKS AND CAICOS ISLANDS**

Appellant

vs.

**CARIBBEAN BUILDING
MATERIALS AND SERVICES LTD**

1st Respondent

and

PRINCIE HARRIS

2nd Respondent

BEFORE:

The Honourable Mr. Justice Mottley,	President
The Honourable Mr. Justice Adderley,	Justice of Appeal
The Honourable Mr. Justice Hamel-Smith,	Justice of Appeal (Ag.)

APPEARANCES:

Ms. Yaa McCartney for the Attorney General
Mr. John Rutley for the First Respondent
Mr. Martin Green for the Second Respondent

HEARD ON: 15, 20 & 25 April, 31 August 2018

JUDGMENT

Hamel-Smith JA

The Decision

1 On April 25, 2018 we allowed the Attorney General’s appeal and quashed the charging order absolute made by the judge on August 17, 2017 against the absolute title held by the Crown. We dismissed the first respondent’s appeal seeking an order to vary the said charging order to make it absolute against a beneficial interest claimed by the second respondent in the leasehold parcel of land held by his wife, Martha Harris. This is the written judgment.

The History

2 In 2001 the Crown granted Martha Harris a Conditional Purchase Lease (CPL) of a parcel of land at Cheshire Hall and Richmond Hill for term of three years from December 6, 2001. The lease was registered as No. 60703/151/1.

3 The purpose of the lease was to allow Martha to build a house on the land and in the event it was constructed within the three-year term (as it was) Martha had the right to buy the absolute title from the Crown at a prescribed purchase price. As it turned out, the second respondent (“judgment debtor”), claimed to have built the house on the parcel of land with his own funds.

4 The judgment debtor however, had purchased the building materials on credit from the first respondent (“CBMS”) and had not settled the debt in spite of several demands to do so. On January 28, 2010 CBMS secured a judgment against him in the sum of \$238,547.21 with interest.

5 CBMS encountered difficulty enforcing the judgment and, in an oral examination as to his means in 2015, the judgment debtor disclosed to the Court that he was entitled to a beneficial interest in his wife leasehold property

on the basis of a common intention constructive trust, he having built the house with his own funds.

The Charging Order Nisi

6 In light of this disclosure, CBMS investigated the title to the parcel of land and found that Martha had indeed been granted a CPL for a term of three years from 2001. CBMS made an application to the Court in October 2015 for a charging order nisi against the judgment debtor's alleged beneficial interest. The affidavit in support of the application repeated the judgment debtor's assertion as to his entitlement to the *beneficial interest* in the parcel of land. The judge made the charging order nisi and fixed a date for the order to be made absolute. The hearing however, was adjourned from time to time until August 2017.

Attorney General's Intervention

7 On August 3, 2017, the Attorney General on behalf of the Crown (as an interested person in relation to the said parcel of land) intervened in the matter and applied for an order discharging or varying the order nisi.

8 Several grounds were referred to in the application which dealt mainly with whether the claim to a beneficial interest in the land was in fact an *interest in land* for the purposes of a charging order in accordance with section 39(3) of the **Civil Procedure Ordinance Cap.4:01** and whether the judgment debtor simply had an interest in the proceeds of sale of the land against which a charging order could not be made.

9 In the affidavit filed in support of the application, the Commissioner of Crown Lands set out the title of the lands leased to Martha Harris by the Crown. It showed that Martha had been granted a Conditional Purchase Lease (CPL) for a period of three years from December 6, 2001 at an annual rental of **\$2,470.00**. The lease was not assignable and the main purpose was to allow her to build a house on the land within the term of the lease (or any extended period not to

exceed 18 months). Once construction was completed within that period Martha was entitled to purchase the absolute title at a price determined by the Crown. By the time the application for the charging order nisi was made in 2015, the term of the lease had long expired. Martha nonetheless continued to occupy the land with the consent of the Crown.

10 The case for the Crown was that on the expiry of the lease Martha's continued occupation was deemed to be that of a periodic tenancy by virtue of section 51 (1) of the **Registered Land Ordinance Cap. 9**. That section provides:-

“(1) Where a person, having fully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the termination of that lease he shall, in the absence of any evidence to the contrary, be deemed to be a tenant holding the land as a periodic tenancy, on the same terms and conditions as those of the lease so far as those conditions are appropriate to the periodic tenancy.”

11 Section 61 (1) of that Ordinance provided that where the period of the lease has expired, the lease and every interest appearing on the register relating to the lease *shall terminate*. The Crown contended that since there was no extension of the lease, the leasehold interest in the land terminated by law and Martha's continued occupation with the consent of the Crown was that of a periodic tenancy. As a result, there was no interest in land against which a charging order could be made.

Decision of the Judge

12 The judge heard the Attorney General's application to intervene together with CBMS' application for the order absolute. In the end, he made the order absolute. However, it was made against the absolute title (what the Judge inadvertently termed the '*freehold*' title) registered as No. 60703/151 held by the Crown and not against the alleged beneficial interest of the judgment debtor in the leasehold title as prayed for in the application.

13 In the result, the Crown filed an appeal against the making of the order absolute. CBMS filed a Respondent's Notice (cross-appeal) seeking to have the charging order varied to attach to the judgment debtor's beneficial interest in the leasehold interest in the land.

The Appeals

14 From the outset, it was apparent that the judge erred in making the charging order against the absolute title. That title was vested in the Crown. The judge gave no reasons for making such an order but the effect of the legislation in respect of charging orders is to have a charging order made against the interest in land held by a judgment debtor. The Crown was not the judgment debtor. It is true that Martha may have had the right to purchase the absolute title but, until she did so, that title remained in the Crown and was therefore unreachable by the judgment creditor. The appeal was accordingly allowed and the charging order against the Crown's title discharged.

15 In the appeal of CBMS, it is difficult to understand why the judge diverted from the application before him to make absolute the very order he had initially made **nisi** against the alleged beneficial interest claimed by the judgment debtor. It is true that with the Crown's intervention, he was entitled to look at the matter afresh and he may have been influenced by its submission that Martha's lease had expired; yet he made no express finding on that critical issue.

16 CBMS had contended that the lease had not terminated because there was evidence to show that the parties had continued to treat as if it were still in force. That is a matter that we may have to deal with but the Crown, and to some extent, attorney for the judgment debtor, raised a more fundamental issue that required examination as it questioned the very existence of the beneficial interest claimed by the judgment debtor and whether that interest was one against which a charging order could be made.

17 The Crown submitted that (i) CBMS had failed to establish that the interest to be charged was owned beneficially by the judgment debtor; (ii) there

was no legal basis to assert that the judgment debtor had an interest in the land and, if an interest were derived from his wife, it was, at best, a beneficial interest in the proceeds of sale of the land; and (iii) in any event, the alleged beneficial interest in land was not capable of being charged in accordance with section 39(3) of the **Civil Procedure Ordinance Cap. 4:01**.

18 Issue (iii) is the more fundamental one in that the beneficial interest claimed by the judgment debtor must be an *interest in land* in accordance with section 39(3) of the Civil Procedure Ordinance. It is necessary therefore to determine what is meant by an *interest in land* under the Ordinance. The remaining issues are concerned with whether CBMS was able to *verify* that a common intention constructive trust in favour of the judgment debtor existed and whether the alleged beneficial interest claimed by the judgment debtor fell within the definition in the Ordinance so as to sustain a charging order against it. Finally, had Martha's leasehold interest expired and therefore incapable of supporting a charging order.

Interest in Land

19 Sections 39 (2) and (3) of the Civil Procedure Ordinance provide as follows:

*“(2) Where the Court makes an order or judgment requiring a **debtor** to pay a sum of money to a creditor, the Court may make a charging order in the prescribed form charging such property as may be specified in the charging order to secure the payment of any money due or to become due under the order or judgment.*

*(3) The property which may be charged by a charging order shall be any **interest held by the debtor in land** including any **interest held by him beneficially under a trust.**” (Emphasis mine).*

20 The Crown submitted that section 39 (3) was not unlike the provisions of the Administration of Justice Act 1956 (UK) in respect of charging orders on land. The meaning of *interest in land* was similar and permitted a charging order

over that interest in land only. A charging order was not effective against assets where no interest in land was created. Essentially, it submitted, interest in land was an interest in freehold and leasehold estates, easements, mortgages and charges.

21 **Inrani Finance Ltd vs Singh** [1971] Ch. 59 was initially relied on by the Crown to demonstrate that where persons held land as joint tenants they did not have an *interest in land* but an interest in the proceeds of sale only. The judgment debtor's interest in this instant appeal was supposed to be similar in that his interest was really in the proceeds of sale. Briefly, **Inrani** involved two brothers who had acquired land as joint tenants with the aid of a mortgage. Orders were made on behalf of the judgment creditor against each of them charging their respective interests in the land. The mortgagee then assigned the mortgage. As joint tenants the two brothers held the beneficial interest in the land under a trust for sale and the plaintiff judgment creditor sought to redeem the mortgage but the party to whom it had been assigned opposed the application.

22 The Court held that joint owners, holding the property on trust for sale and for themselves beneficially, did not hold sufficient *interest in land* as required by the legislation to support a charging order. Since those equitable interests were not caught by section 35 of the Administration of Justice Act 1956, (UK) no charging order could be made. Their interests were in the proceeds of sale.

23 The case however, was useful in another way in that it gave some insight into the meaning of *interest in land*. The Court dealt with the meaning of *interest in land* for the purposes of a charging order under section 35 of the Administration of Justice Act 1956. Cross LJ said that the words '*interest in land*' were, in an *appropriate context*, capable of including interests under trusts for sale of land and while concluding no opinion on the point, he emphasised that the Court did not wish to be taken as casting any doubt on the correctness of the dicta in **Cooper v Critchley** [1955] Ch. 431 that '*for one hundred years before 1956 the words, or equivalent words, have been held in this field not to*

include interests arising under trusts for sale'. He concluded after referring to **Bull v Bull**, that “*no doubt tenants in common are interested in the land in a general sense...but that is not the same thing as their being owners of equitable interests in realty.*”(my emphasis).

24 Turning now to the meaning and extent of the words in relation to *land* as used in section 39(3) of the Ordinance, there are two estates in land that are recognized by law, viz., the absolute (or freehold) estate and a leasehold estate or term of years in possession. Those are two legal estates that are capable of being owned by a person. Therefore, the words in 39(3), *any interest held (by the debtor) in land*, are a reference to the person who **owns** the legal estate, whether it is the absolute title or leasehold title. In the instant appeal, the Crown owns the absolute title and Martha owned the leasehold title for a term of three years.

25 As to the meaning of the words *any interest (in land) held beneficially under a trust*, the legislation envisages that the legal estate may be vested in trustees or executors to be held in trust for a beneficiary absolutely. Although the beneficiary does not own the legal estate, he has an immediate and indefeasible right to deal with it for his own benefit. This is sometimes referred to as a bare trust where there is generally one beneficiary and since he is entitled to the whole beneficial interest in the land, he is free to terminate the trust and demand the legal from the trustees. If there are two or more beneficiaries, once they are in agreement they can do likewise. Where the beneficiary is the judgment debtor, since he has power to procure dealings with the legal estate for his own benefit then the legal estate can be made the subject matter of a charging order (see **Law Comm. Report #74 – Charging Orders**).

26 The provisions of section 39 (3) are therefore confined to the ownership of the legal estate and to the beneficial interest where it is held in trust for the beneficiary absolutely. That is the only interest that can support a charging order under the provisions of the Ordinance. Further, section 39(5) requires that “*the charge shall be completed by its registration as an **encumbrance** by the registration of the creditor as its proprietor...*”. This is keeping with the provisions of the Registered Land Ordinance CAP.19:01 where an estate

capable of subsisting as a legal estate is the *interest in land* in respect of which a proprietor can be registered.

27 Section 39 (3) and (5) of the Ordinance, not unlike section 35 of the Administration of Justice Act, 1956, was designed to cover only those cases in which the legal estate itself could be charged. While the 1956 Act has since been repealed and replaced by the provisions of the Charging Orders Act 1979 (UK) which extend the kind of assets which may now be charged, including proceeds of sale under a trust for sale, the provisions of the Ordinance here have not changed.

Interest in land claimed by the judgment debtor.

28 Two main issues arise here. The first is the verification of the constructive trust by CBMS in its application for the charging order. The second is whether the interest derived from such trust is an interest in land under section 39(3) of the Ordinance. When the judgment debtor was questioned as to his means some time before the making of the order nisi, he claimed to have an interest in the leasehold property of Martha on the basis of a common intention constructive trust in that he had contributed to the building of the house with his funds. Such common intention trust is known to the law, particularly in relation to family owned property where there is an absence of legal joint ownership, as in the instant case and the only recourse is to establish an equitable interest under either property law (if applicable), trust principles or equity assumptions.

29 Accordingly, where a dispute arises as to whether there is a constructive trust, the first step for the purposes of verification should be to determine if there has been an express declaration of trust. A declaration is required by law to be in writing. The mere *say so* of the judgment debtor in the instant appeal that there is a constructive trust in his favour may be sufficient (I do not decide the point) for the purposes of securing an order nisi but at the order absolute stage much more is required. The difficulty in this case is that CBMS were relying on the judgment debtor's assertion that there was a trust in his favour

and producing a declaration obviously proved insurmountable. However, since Martha, the owner of the legal estate, was not heard at either stage of the application and her interest was at stake, it was necessary for the purposes of *verification* under the Ordinance before the making of the order absolute, that an express declaration be produced or, at the very least, Martha's (whether by way of affidavit or otherwise) concurrence with the judgment debtor's assertion. The extent of the beneficial interest in the judgment debtor's favour could always be determined at a later date, if necessary.

30 Since neither an express declaration was produced nor was Martha heard, the issue of verification remained open. In the absence of an express declaration, in order to claim a beneficial or equitable interest, the judgment debtor would have to prove in a court of law that his contribution entitled him to an equitable or beneficial interest in the property. Ideally, it was open to the judge hearing the application for an order absolute to stay the proceedings and direct the judgment debtor to proceed with an application to the court against his wife for an order declaring his interest in the property. Of course, this did not happen. Therefore there was an absence of verification altogether. The second question remains however, and that is whether the equitable or beneficial interest in the property, if the judgment debtor's application for a constructive trust sometime in the future were successful, is an *interest in land* in accordance with section 39(3)?

31 The meaning of *interest in land* has already been settled (above). A constructive trust can arise where one party has expended money on another's property. There is a general presumption in such circumstances that the expenditure is not intended as a gift but instead places an equitable obligation on the legal owner of the property to return the appropriate sum.

32 Before the well-known cases of *Pettit v Pettit* and *Gissing v Gissing* it was presumed that in the absence of an agreement between husband and wife to share the beneficial interest of the property, the non-contributing spouse's interest was only recognized when a direct payment was made towards the purchase price of the property. The common intention was that the legal owner would hold the property on trust for both beneficiaries. In **Pettit and Gissing**,

the House of Lords held that indirect contributions such as ‘domestic activities’ were not sufficient to create a beneficial or equitable interest without an agreement between the parties. The Courts however, evolved over the ensuing years and resorted to fairness and justice to determine beneficial interests.

33 But that said, what must be recognised in all the cases is that the beneficial or equitable interest derived by the contributing spouse or as a result of ‘fairness’ is that the legal estate remains vested in the legal owner and the court determines the proportion in which the beneficial interest will be shared. There is no vesting of ownership of the property in the non-owner. What happens is that the legal owner is then ordered to hold a beneficial interest in trust for the other spouse in a certain proportion and in the event of a sale that person will receive his or her proportion of the proceeds of sale. In the instant appeal, the legal estate held by Martha was non-assignable and as a result no interest could be passed to the judgment debtor. Accordingly, in the final analysis, the judgment debtor’s interest could only be in the proceeds of sale which under the present law is not an *interest in land* sufficient to satisfy the requirements of section 39(3) of the Ordinance.

34 As mentioned earlier, the 1956 Administration of Justice Act (UK) (Charging Orders) was repealed and replaced by the 1979 Charging Orders Act (UK). This latter Act in section 2 (1) extended the assets to which a charging order could attach. It included any interest that the debtor held beneficially in land or under **any** trust. Regrettably, section 39(3) of the Civil Procedure Ordinance applies to bare trusts only.

Expiry of the Lease

34 This leaves the issue of whether the beneficial interest in the leasehold land held by Martha could survive if the lease itself had expired. Given the decision arrived at by this Court that the judgment debtor’s interest in the alleged constructive trust is not in accord with section 39(3) of the Ordinance, it served no useful purpose deciding whether the lease had expired or not.

Costs

35 The appeal by the Attorney General was allowed and the order absolute quashed. It was obvious that the judge had made a critical error that had to be rectified. There would be no order as to costs.

36 The first respondent's appeal to have the charging order absolute varied was dismissed and the first respondent shall pay 75% of the Attorney General's costs of that appeal. No costs are awarded to the second respondent.

Dated this 31st day of August 2018

Hamel-Smith J.A.

I agree

Elliot Mottley, P.

I also agree

Neville Adderley, J.A.