ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 354 OF 2000

BETWEEN:

ANNE GEORGE

Claimant

and

BERNARD LOUIS DAISLEY
and
CIBC CARIBBEAN LIMITED

Defendants

Appearances:
Nicole Sylvester for the Claimant
Cecil A Williams for the 1st Defendant
Maferne T Mayers-Oliver for the 2nd Defendant

2001: September 26
2002: January 14, February 4

JUDGMENT

[1] **MITCHELL, J**: This was a constructive trust case. The action began by the filing by the Claimant on 21 August 2000 of an application for an interlocutory injunction. After various interlocutory applications, the Master on 16 March 2001 ordered that the filed affidavits stand as pleadings and that the matter be tried in open court by the judge.

[2] The Claimant claimed a declaration that she is a beneficial owner of one half share or such other share as the court deemed fit of the property described in deed No 3341 of 1998; that the property be vested in the Claimant and the 1st Defendant; an injunction restraining the Defendants or either of them from selling or disposing

of the property; all necessary accounts, directions and inquiries; damages; and costs.

[3] By her affidavit filed on 21 August, 2000, the Claimant deposed that she was the common law wife of the 1st Defendant; that at the age of 13 she had started a relationship with the 1st Defendant which had resulted in her having a child for him at the age of 14; that as a result of her pregnancy she had been sent to Trinidad; that she and the 1st Defendant had thereafter lived separate lives; that about 5 years previously the 1st Defendant had come in search of her in Trinidad and had begged her to forgive him and to restart the relationship; that she had agreed to do so and had uprooted herself and her children and had moved to St Vincent; that she and the 1st Defendant had found lands to build a home on for them to live in; that in 1998 the land had been obtained and title registered in the name of the 1st Defendant by deed No 3341 of 1998; that all her monies earned and saved in Trinidad had gone into the construction of the home on the land; that she also did physical work on the construction of the home; that in late 1999 unhappy differences had arisen between the two of them and out of an abundance of caution she had registered her beneficial interest in the Registry of Deeds by deed No 1528 of 2000; that all her savings had been tied up in the property that is now her only home; that the property is subject to a mortgage to the 2nd Defendant; that by notice in the 'Searchlight Newspaper' the 2nd Defendant had indicated its intention to sell the property on 23rd August 2000; and that she had at all times since the construction of the home lived in the property.

[4] On 23rd August 2000, the court granted an ex *parte* interlocutory injunction restraining the Defendants from selling or disposing of the property until after the trial of the action or further order. At a subsequent hearing *inter partes*, the injunction was ordered to continue to trial or further order. No further order has been made.

[5] On 14 December 2000 an affidavit by Andre Cadogan of the 2nd Defendant bank (hereinafter "the bank") was filed. He deposed that in 1998 the 1st Defendant had approached the bank and had subsequently received a loan of $65,000.00 secured by a mortgage; that he had held himself out to be the sole owner of the property in dispute; that the bank's solicitors had searched the Registry of Deeds and had found no encumbrances registered relating to the property; that the mortgage had been registered as deed No 3850 of 1998; that in 1999 the bank had upstamped the mortgage to the sum of $170,000.00 which had been secured by a deed of further charge registered as deed No 1337 of 1999; that the 1st Defendant had become delinquent in paying the loan; that the bank had decided to exercise its powers of sale; that the bank had not been in a position to be able to investigate the domestic arrangements which the 1st Defendant might have made; that deed No 1528 of 2000 had not constituted effective notice to the bank as it had been registered after the mortgage; that the Claimant had had considerable benefit from the use of the bank's funds; that the bank had done what was reasonable and in keeping with good business practice obtaining in St Vincent and the Grenadines to ensure that the property would provide the necessary security for the loan and that it was not encumbered in any way; that it was denied that the Claimant had any interest in the property that would have overridden the legal right of the 2nd Defendant to recover monies owing to it under the deed of legal mortgage; that the bank was being unduly prejudiced by the Claimant's action in delaying the sale of the property as it was now unable to recover monies loaned to the 1st Defendant in good faith; and, that the court was requested to make an order to have the property sold as provided for under the powers of sale of the mortgage deed and to remove the injunction placed on the sale of the property.

[6] On 1 February 2001 the bank applied for an order discharging the interlocutory injunction. On the same date, in support of the application, Andre Cadogan swore a supplementary affidavit. In it, he deposed that the bank had extended an overdraft facility as well as other services to Civil Construction Ltd (hereinafter "the

company"), a company managed by the 1st Defendant; that the 1st Defendant had signed a guarantee and postponement claim dated the 11th February 1994 guaranteeing the payment to the bank of all present and future liabilities of the company; that the mortgage executed in 1998 by the 1st Defendant had been made to support this guarantee; that on 19 April 1999 the 1st Defendant had signed a letter acknowledging his acceptance of continued responsibility in relation to the liabilities of the company to the bank; that in consequence a second loan had been granted to the 1st Defendant based on the security of a deed of further charge; that the Claimant had managed the 1st Defendant's office and had been a director of the company and had been authorised to sign all transactions on behalf of the company, and on 20 May 1996 the Claimant had become a signatory to Account # 24021-14 which was the sole chequing account of the company; that the Claimant as a director of the company knew or ought to have known of the existence of the mortgage of the property in favour of the bank which had been executed on 1 December 1998 shortly after the property had been purchased; that the Claimant as a director of the company knew or ought to have known of the existence of the letter signed by the 1st Defendant acknowledging his acceptance of continued responsibility in relation to the liabilities of the company; that the Claimant had been involved in managing the company from in or around May 1996, and if she had invested any money subsequent to 1998 on the construction of a building on the property she knew or ought to have known that the company had been in overdraft and that the overdraft had been guaranteed by the said property; and, that the impression that the Claimant was seeking to give to the court that she was an unknowing victim of the actions of the 1st Defendant was erroneous and misleading.

[7] To the above two affidavits, and in response to the application to discharge the injunction, the Claimant on 9 February 2001 swore and filed another affidavit, which to a large extent repeated what she had earlier deposed to in her affidavit of 21 August 2000. She deposed that she was the common-law wife of the 1st Defendant; that in 1998 she and the 1st Defendant had agreed to obtain lands and

to build a home on it for them to live in; that the land referred to in deed No 3341 of 1998 had been obtained for that purpose; that she had used all her savings earned in Trinidad to put into the construction of the home on that land; that due to unhappy difference between her and the 1st Defendant she had since registered her beneficial interest in the property by deed No 1528 of 2000; that all her savings were tied up in the property which was her only home where she lived with her children; that she had not been aware when the 1st Defendant had given the mortgage and guarantee and had only become aware of them when the property had been advertised for sale; that she had been made a director of the company because not only had she put some of her savings into the company but she had worked in the company to help it develop without being paid a salary; that she had been informed by the 1st Defendant that the bank was the company's bankers and she had been appointed a director with the ability to transact on behalf of the company; that she had no knowledge of the negotiations and arrangements between the 1st Defendant and the bank; and, that had the bank conducted a full and proper investigation of the property they would have realised that she had been in occupation of it.

[8] The Claimant on 6 March 2001 filed a further affidavit in support of her claim. In it she deposed that in the year 1998 she had not been a party to the mortgage, and that in any event in the year 1999 she had been living in the property and the bank by that time had been aware or ought to have been aware that she was living there with her children and had been reckless in advancing a further charge on the property to the 1st Defendant; that she had never been made aware by either of the defendants of the mortgage or further charge on the property; that she had since learned that the 1st Defendant had used the property to secure his Mastercard payments; that she had not received any benefit from the monies advanced by the bank to the 2nd Defendant; that if the bank had properly investigated the property they would have discovered her interest in it as she had been living there with her children; that the bank had actual and/or constructive notice of her interest; that apart from the mortgage the bank had used the

property to secure an overdraft No 32402114 in the sum of $58,899.66, a loan No 10004258 in the sum of $21,501.49, and MasterCard charges in the amount of $4,675.10 to the 1st Defendant unknown to the Claimant; that although the Claimant had been made a director of the company since the year 1996 the 1st Defendant had kept her out of the management of the company; that the Claimant had been a director in name only; that all her savings were tied up in the property and that if a sale of it was conducted as proposed she would be greatly aggrieved and would suffer great financial hardship as she and her children had no where else to live.

[9] On 12 March 2001 the 1st Defendant swore and filed an affidavit in response to those of the Claimant. In it he deposed that it was true that he had had a child with the Claimant, which child had been born on 8 March 1975; that the Claimant had had two children for another man before going to Trinidad in the year 1981; that he had met the Claimant in Trinidad in March 1996; that she had been having problems with the people with whom she had been living and had decided to leave; that he had paid her relocation expenses to St Vincent because she did not have any money; that he had not caused her to uproot herself from Trinidad as she had deposed; that he had never agreed with the Claimant to obtain any lands to build a home for the two of them to live in; that his brother who lived in Canada had won the National Lottery there and had given him Canadian $70,000.00 which he had used to purchase the land which was the subject of deed No 3341 of 1998 and to help with the construction of the house; that he had provided all the funds for the construction of the house and because he had been a builder and contractor he had been able to reduce the cost of construction; that the Claimant had had no money when she had returned to St Vincent; that the Claimant had helped to move sand for the construction of the house and had helped to keep an eye on the workmen because she was a paid employee of the company; that the Claimant did not have a beneficial interest as she alleged and as she had claimed; that the Claimant had never put any savings or used up any of her money on the property as she alleged; that he had signed the legal deed of mortgage and the

deed of further charge to the bank; that the Claimant had known of the transactions but had never shown any interest in the property; that the Claimant had set out on a path of personal vengeance towards him because they were no longer living together since December 1999 and that was why she was now claiming an interest in the property.

[10] On 21 March 2001 the Claimant swore and filed a further affidavit in response to that of the 1st Defendant. In it she deposed that the Defendant had come in search of her in Trinidad, had begged her to forgive him, and had stated that he loved her and wanted the two of them to get married; that he had visited her on about 3 different occasions always pleading with her to give him a second chance; that on the 4th occasion he had turned up with an airline ticket saying he needed her and wanted them to get married; that she had decided to give him a chance and had come to St Vincent bringing all her savings and giving up her job at Fashion Classics; that she had had no problems with the people with whom she had been living in Trinidad; that she was not aware either of the 1st Defendant's brother winning the lottery or giving the 1st Defendant any money; that it was a fact that she had moved sand and other construction materials on the house; that she had overseen the construction site of the house; that she had never been a salaried worker with the company; that if she had been a salaried worker the 1st Defendant should have exhibited her salary slips to reflect that; that in the year 1997 she and the 1st Defendant had gone to Canada to shop for wedding items and that to this date she was in possession of her wedding dress as well as other related wedding items; that she denied being on a personal vendetta; that the 1st Defendant had at all times assured her that even if he died her interest in the property would be considered because he had made a will to that effect. Exhibited to the affidavit is just such a will, executed and witnessed, but undated, in which he leaves ¾ of his estate to his 5 named children and ¼ to the Claimant.

[11] With leave of the Master the 1st Defendant on 31 May 2001 swore and filed another affidavit in the matter. In it he repeated, *inter alia*, that the Claimant had

been a salaried worker of the company. He exhibited a copy of the St Vincent and the Grenadines National Insurance Scheme Monthly Turn-around Contribution Schedule from the years 1997 to 1999. This was a bundle of monthly forms detailing the salaries and contributions of each of the employees of the company. All the monthly sheets appear to have been prepared and filed at the NIS, according to the NIS receipt stamped on them, on the same date 30 May 2001, ie, two months after the above last affidavit of the Claimant.

[12] When the matter came up for hearing on 18 September 2001 the 1st Defendant was not present in court and on the application of his counsel the matter was adjourned to 26 September to give him an opportunity of appear at the trial, the 1st Defendant paying costs of $350.00 to the Claimant on or before 26 September 2001 failing which his affidavit was to be struck out. It was also agreed and directed that at the resumed hearing all witnesses would be present only for cross-examination on their affidavits.

[13] When the trial resumed on 26 September, counsel for the 1st Defendant stated that he had learned that the 1st Defendant had only recently arrived in the USA and had started working and could not return to St Vincent to be cross-examined. He applied to produce live witnesses to testify on behalf of the 1st Defendant. The Claimant objected. The court did not allow the application of the 1st Defendant in view of the directions given earlier and because to do so would have amounted to permitting trial by ambush. Appearing at trial to be cross-examined on their affidavits were the Claimant and Andre Cadogan. The 1st Defendant did not appear to be cross-examined. As a result, his testimony has not been tested, and the court can give his affidavit evidence very little weight. The Claimant gave her evidence clearly and confidently, though as with many persons she was weak on exact dates. She was not shaken in any way in cross examination. Where the testimony of the 1st Defendant conflicts with that of the Claimant, I prefer to believe the Claimant.

[14] The facts as I find them are that many years ago, after having had a child for the 1st Defendant, the Claimant had emigrated from St Vincent to Trinidad where she had earned her living as a seamstress and clothing designer. I am satisfied that she was an industrious and thrifty person who, as she testified, saved her money. I am satisfied that she was indeed brought back to St Vincent in the year 1996 by the 1st Defendant, who did not deny it. I believe that the 1st Defendant invited her to marry him, encouraged her to purchase wedding clothes, and induced her to invest her savings into the proposed matrimonial home, which was to be built on the land that they purchased together. The half-acre lot of land in dispute was purchased in September 1998 for the sum of $90,000.00, which sum was provided by the Claimant and the 1st Defendant. The property was acquired by deed No 3341 of 1998 executed by the vendors alone and naming as the transferee or purchaser only the 1st Defendant. The Claimant and the 1st Defendant with the help of the building crew employed by his company constructed the house on it with their savings. No one alleges that they borrowed money from any bank to build the house. I do not believe the story of the brother and the gift of Canadian $70,000.00 supposed to have been used to buy the land. The fact that the 1st Defendant left the Claimant and her children in possession of the property when he left St Vincent to emigrate to the USA is telling. I believe the Claimant that the lion's share of the money for the purchase of the land and construction of the building came from the funds of the Claimant, but that the 1st Defendant being a building contractor with access to building materials and labour facilitated the construction of the building at a fraction of the price that it would otherwise have cost.

[15] On 11 February 1994, prior to the return of the Claimant to St Vincent and prior to the purchase of the land, the 1st Defendant had guaranteed the liabilities of the company, which was his construction company. The company was at the time in 1994 in financial difficulties with the bank, which was looking for security for its loan.

[16] After the Claimant returned to St Vincent in the year 1996 with the 1st Defendant, she found work in her field as a seamstress. The 1st Defendant, however, needed her assistance in the management of his company more than he needed her financial contribution from her earnings from sewing. I accept her testimony that shortly after she returned to St Vincent he invited her to join him in the management of the company. I have no reason to doubt her statement that she also contributed funds to the company, but this claim is not an issue in this case. There is no suggestion that she is a shareholder in the company. On 17 May 1996 the 1st Defendant caused a letter to the bank to be submitted on the company's letterhead adding the Claimant to the company's account as a director authorised to transact business on behalf of the company. The Claimant gave a specimen signature on the card provided. The Defendants have been unable to produce one other banking document relating to any business between the company and the bank and signed by the Claimant, and I have no reason to doubt her statement that she never exercised any authority in practice over the company's banking affairs. She was the common law wife and partner of the 1st Defendant and had allowed her name to be placed on the company account in accordance with usual family arrangements. She signed company cheques to purchase building materials as the company needed them in its various projects, but she took no part in the management of the company. The 1st Defendant has attempted to claim that the Claimant was a mere employee of the company and that she was paid for what work she did in supervising the construction of the house on the property. The NIS forms produced by the 1st Defendant in support of this contention were all prepared and lodged at the NIS, no doubt with payment of the appropriate contributions, after the suit had begun and after the Claimant had deposed that she had never been employed by the company on a salaried basis. The forms were prepared for the purpose of proving that the Claimant had been a paid employee of the company. Perhaps, if they had been prepared in the usual manner and filed monthly in due course as required by law, they might have served as some evidence of the alleged employment. But, in their present form they are unacceptable and I find that they were prepared with the intention of

misleading the court. I accept that the Claimant worked on the house and helped with the supervision of the crew because it was her house, and that she was never paid a salary. She was an unpaid director of the company.

[17] The Claimant and the 1st Defendant went into occupation of the house in mid-November 1998. On 1st December 1998, in compliance with his earlier 1994 guarantee to the bank, the 1st Defendant mortgaged the property in the amount of $65,000.00 to the bank, which mortgage was registered as deed No 3850 of 1998. The 1st Defendant does not deny that he told the Claimant nothing about this mortgage. I am satisfied that he concealed the mortgage from her, as he was putting up his and her land and the house that he and she were building on the land as security for a business loan. Nor did the bank make any enquiries at the premises or of the Claimant, though she was at all times in actual occupation of the premises. As Mr Cadogan testified, the bank inspects a property given to it as security for an advance only to determine its physical condition, not to determine whether it is a household. The present procedure is that the bank examines the property to ensure that it exists in reality and appears to have the value needed by the bank as adequate security for the loan in question. The bank makes no enquiry as to other persons having any possible claim to an interest in the property. The bank's land security forms do, as Mr Cadogan testified, make provision for an enquiry to be made of the borrower as to whether he admits to a spouse. But, the bank does not independently investigate as to whether there is in fact a spouse or some other person with an interest in the property. No investigations are made of persons who actually occupy the premises being offered as security. To a large extent, the bank relies on the information given to it by the person seeking to borrow money from the bank. That approach was taken by the bank in this case both for the original charge and for the further charge. The solicitors for the bank subsequently carried out the usual searches in the Registry of Deeds and advised the bank in due course that the land in question was found by them to be free from encumbrances. The solicitors thereafter prepared the mortgage documents, which were executed by the 1st Defendant and

duly registered by the solicitors. The same was done when the mortgage was later upstamped. The Claimant was during all this time completely unaware of the mortgage or of the further mortgage of the property given by the 1st Defendant to the bank.

[18] After the granting of the mortgage on 1 December 1998 by the 1st Defendant to the bank to secure the loans to the company, the fortunes of the company continued to decline, and the bank extended further credit to it. The bank, by a letter dated 19 April 1999 addressed to the 1st Defendant c/o the company, advised him that the mortgage of $65,000.00 was now to be upstamped to cover $170,000.00. To "ensure there are no misunderstandings," this letter from the bank also required the 1st Defendant to confirm that he acknowledged the guarantee and that he remained liable for all the company's present and future liabilities. This the 1st Defendant did by signing and returning the copy of the letter to the bank. The resulting deed of further charge executed by the 1st Defendant was dated 23 April 1999 and was registered in the Registry of Deeds as deed No 1337 of 1999. This further charge was concealed by the 1st Defendant from the Claimant for the same reasons as the earlier mortgage had been.

[19] At some stage in the year 1999, and for reasons that are not relevant to this case and that have not been revealed to the court, the relationship between the Claimant and the 1st Defendant broke down. He left the home and has now, we are informed, emigrated to the USA where he has found work and where he intends to remain. He does not appear to be about to return to St Vincent, and has abandoned the Claimant, having arranged to squeeze all of the equity he could out of their jointly owned property. He supports the bank in its effort to sell the property to repay the loans made to him and his company.

[20] Early in the year 2000, no doubt occasioned by the continued delinquency of the loans, the bank published in the newspapers its intention to sell the property in dispute over which the 1st Defendant had given it a mortgage. The Claimant read

the notice of sale in the newspaper and as a result visited the premises of the bank to investigate the matter and so learned of the mortgage by the 1st Defendant. I accept that she complained to the1st Defendant and that he told her not to worry, that he was taking care of it. The Claimant, however, took the precaution on 24 May 2000 of registering in the Registry of Deeds, as permitted by the law of St Vincent and the Grenadines, a declaration of her claim to share beneficially in the property, title of which had been earlier registered in the name of the 1st Defendant in deed No 3341 of 1998. She did not commence proceedings immediately. The subsequent publication by the bank in August 2000 of the second notice of sale resulted in the filing of the suit by the Claimant on the 21st of the same month.

[21] At the conclusion of the evidence, all counsel produced their skeleton arguments and copies of the authorities on which they relied, which the court found most useful and for which the court expresses its appreciation. The 1st Defendant relied on the following authorities:

> **Re: Sharpe (a bankrupt) ex parte the trustee of the bankrupt v Sharpe and another [1980] 1 All ER 198**
> **Crabb v Arun DC (1975) 2 All ER 865**
> **Williams and Glyn's Bank Ltd v Bolan and another, Williams & Glyn's Bank Ltd v Brown [1980] 2 All ER 408**
> **Ashburn Anstalt v Arnold [1988] 2 All ER 147**
> **Lloyds Bank plc v Rosset and another [1988] 3 All ER 915**
> **Baunsley's Conveyancing Law and Practice, 4th Edition, 1998, pages 560-565.**

Re Sharpe [supra] was a bankruptcy case. It involved a question of whether an aunt who had lent money to the debtor to purchase property in return for a right to live in the property with the debtor and his family and be cared by them had an irrevocable licence to occupy the property and whether that interest was binding

on the trustee in bankruptcy. It was held that the aunt did not have an equitable interest in the property under a resulting trust but rather an irrevocable licence to occupy the house until the loan was repaid which licence arose under a constructive trust, which conferred on her an interest in the property binding on the trustee. The facts and issues in this case are so far removed from those in our instant case that I cannot see how it will assist the 1st Defendant. **Crabb's case** [supra] similarly rested on completely different facts and dealt with issues of *estoppel in pais* and estoppel by conduct relating to a right of way. The **Williams and Glyn's Bank case** [supra] was a registered land case dealing with overriding interests. In that case, the House of Lords held that the husband and wife were equitable joint tenants in common of the matrimonial home by virtue of both having contributed to the purchase price, although only the husband's name appeared as the registered proprietor on the register in the land registry. The husband without the wife's knowledge had mortgaged the home under a legal mortgage to the bank. Before taking the mortgage, the bank did not enquire of the husband or the wife whether the wife had any interest in the property. The husband defaulted on the mortgage and the bank applied for and was granted possession. On appeal to the Court of Appeal the order for possession was discharged on the grounds *inter alia* that the wife was in actual occupation of the land within the provisions of section 70(1)(g) of the **Land Registration Act 1925**, and accordingly had an 'overriding interest,' within section 70(1) which entitled her to remain in possession against the bank and subject to which the bank had taken the mortgage. The appeal to the House of Lords by the bank was dismissed. As Lord Wilberforce observed at page 415 J,

> But, conceded, as it must be, that the Act, following the established practice, gives protection to occupation, the extension of the risk area follows necessarily from the extension, beyond the *paterfamilias*, of rights of ownership, itself following from the diffusion of property and earning capacity. What is involved is a departure from an easy-going practice of dispensing with inquiries as to occupation beyond that of the vendor and

> accepting the risks of doing so. To substitute for this a practice of more careful inquiry as to the fact of occupation, and, if necessary, as to the rights of occupiers, cannot, in my view of the matter, be considered as unacceptable except at the price of overlooking the widespread development of shared interests in ownership.

This case dealt with the interpretation of interests new to the common law and existing only within the scheme of the **Land Registration Act**, and it does not assist the Defendants. The general observations of Lord Wilberforce as to the duty of a lender to make enquires are now, after all these years, accepted as the basic minimum duty resting on a banker who wishes to take care of his own interests.

[22] **Ashburn Anstalt** [supra] was a landlord and tenant case within the context of the **Land Registration Act, 1925**. It concerned the rights of a licencee against a purchaser with notice. It does not assist us in this case. The **Lloyd's Bank case** [supra] was another **Land Registration Act, 1925** case. It dealt with what in the Act are called 'overriding interests,' something alien to St Vincent law. In that case, a husband and wife decided to buy a semi-derelict farmhouse with money provided by the husband alone but with the common intention of the husband and wife that the renovation of the house should be a joint venture and that the wife should have a beneficial interest in the property under a constructive trust. The vendors permitted builders engaged by the husband and wife to enter the property prior to completion to begin the extensive repairs that were necessary to make the house habitable. The husband, without the wife's knowledge, obtained a bank overdraft to provide funds for the purchase price and the cost of the repairs, and executed a charge in favour of the bank. The wife spent nearly every day at the house with the builders, but only occasionally spent some nights there even after completion. The husband was away on business for much of the time. By the time the charge was later registered the wife was in actual occupation. When the loan went into default the bank commenced proceedings for sale of the property

and the wife resisted the bank's claim on the ground that she had an overriding interest because she had been in actual occupation of the land on the date when the bank's charge was registered. It was held that

> (1) . . . Where a wife claimed that she had a beneficial interest in a house registered in her husband's name and that her interest had priority over the rights of a mortgagee under a legal charge executed by the husband without her knowledge, she had to have been in actual occupation of the house at the time the mortgagee's charge was executed rather than merely when it was registered, if her interest was to be protected as an overriding interest under ss 20(1) and 70(1) of the 1925 Act.
>
> (2) On the facts, the husband and wife had taken over the property prior to completion under a revocable licence granted by the vendors and were in actual occupation by virtue of the presence of their builders on the property at the time the charge was executed. The wife was therefore a person in actual occupation at that date. Moreover, if prior to executing the charge the bank had made inquiries at the house the presence of the builders or of the wife would have put it on notice as to the wife's interest . . .

The effect that the application of the principles enunciated in the **Lloyds Bank case** [supra] and the **Williams and Glyn's Bank case** [supra] would have to the facts in our case is self evident. The Claimant was a person in actual occupation at the date of the mortgage by the 1st Defendant. If prior to executing the mortgage the bank had made enquiries at the home the presence of the builders or the Claimant would have put it on noticed of the Claimant's interest.

[23] At the conclusion of the instant case, the bank submitted that it could not have known about the Claimant's alleged beneficial interest because the Claimant and the 1st Defendant were not married and there was no documentation to prove that

the Claimant had any interest in the property at the time. The bank relied on the case of **Bristol and West Building Society v Henning and another [1985] 2 All ER 606**. This case was one where after the Defendants had been living together as man and wife for 4 years they had agreed to purchase a property. The property had been purchased in the name of the husband alone with a loan from the building society which had been granted a legal charge under the **Land Registration Act, 1925**. Neither the conveyance nor the legal charge had suggested that the husband was anything other than the sole beneficial owner of the property. After the separation of the parties, the wife had been granted a consent order whereby it had been declared that she had a one-half beneficial interest in the property. The husband had ceased to pay the mortgage instalments, and the building society had sought to enforce its mortgage, but the judge had struck out the claim of the building society. It was held by the court of appeal, quoting from the head note, that

> In the absence of an express agreement to establish a beneficial interest in property or some lesser property right, such as an irrevocable licence, it was necessary for the party claiming the right to show that, as between him and the legal owner, there was an express or imputed intention or assumption that he should have such a right. Where the parties had not contemporaneously expressed any intention as to the beneficial interests in the property, such an intention, if it existed, had to be imputed to them from their actions. Since the woman knew of and supported the proposal to raise the purchase price of the property by a mortgage, it was impossible to impute to the Defendants any common intention other than that the man, as trustee, was to have power to grant a mortgage to the building society which would have priority over any beneficial interest in the property. Accordingly, if the woman had any equitable right or interest in the property, such right or interest was subject to the building society's charge and did not afford a defence to the building society's claim for possession. The building society's appeal would therefore be allowed.

In our case, by contrast, the wife had not been informed of the intention to mortgage the property and had not consented to the granting of the mortgage, and had not benefited from the loaned funds secured by the mortgage. It is not clear how this case helped the 2nd Defendant bank.

[24] Counsel for the Claimant submitted in her turn that the Claimant's direct and indirect contributions to the purchase of the land and the construction of the house by contributing from her savings and by her unpaid labour on the construction of the house would cause a trust to be imposed in these circumstances "as justice and good conscience required it," per Lord Denning in **Hussey v Palmer [1972] 3 All ER 747**. She submitted further that the conduct of the parties constituted *prima facie* evidence of a common intention that the Claimant should have a beneficial interest in the property even though her former common-law husband had taken title in his name alone. She urged on the court the words of Sharma J, in the 1987 unreported Trinidad and Tobago High Court case of **Harrinarine v Aziz,** and quoted by Gilbert Kodilinye at page 147 of his "Caribbean Law of Trusts," that any other conclusion would be "repugnant to any decent person's sense of justice." **Harrinarine v Aziz** really dealt with the unique position of the common law marriage in Caribbean societies. Sharma J said that he was

> prepared to hold that, in our jurisdiction, the living together in a common law relationship over an extended period of time during which the 'wife,' out of her earnings, looks after the children (whether they are her husband's by another union, or theirs) and looks after household and other expenses, constitutes *prima facie* evidence of a common intention that she should have a beneficial interest in the property which is solely in the name of the common law husband . . . No reasonable man in our society, looking at the present situation, can come to any other conclusion. It would be repugnant to any decent person's sense of justice.

In our case, the facts are slightly different. The woman and the man in our case had not been living together for a long period of time. On the other hand, in our case, the wife's earnings had made a substantial contribution to the purchase of the land and the construction of the house.

[25] Counsel for the Claimant submitted further that the absence of an express agreement between the Claimant and the 1st Defendant did not debar the court from declaring that the Claimant has a beneficial interest in the property; that it was open to the court to find as a fact, whether expressly or inferentially, that there was an agreement between the Claimant and the 1st Defendant at the time the land was purchased and the erection of the dwelling house commenced, or indeed, at any time thereafter, that the Claimant would have a beneficial interest in the property; or that the evidence gave rise to circumstances in which the law would impute a communality between the parties that the Claimant would have a beneficial interest in the property. As regards the share of the interest of the Claimant, she relied on the principle that 'equality is equity' and referred to the Barbados High Court case of **Austin v Austin [1978] 31 WIR 46** at p.50. In that case, Worrell J said,

> The evidence discloses that each party made a substantial contribution, and in the absence of any evidence to quantify their shares I would adopt the principle stated by Sir Raymond Evershed MR in his judgment in **Rimmer v Rimmer [1952] 2 All ER 863** at 867 as a guide in determining their respective interests. The principle is stated thus, 'Where the court is satisfied that both parties have a substantial beneficial interest and it is not fairly possible to assume some more precise calculation of their shares, I think that equality necessarily follows.'

Justice Worrell accordingly held that each party was entitled to one-half of the beneficial interest. This is the more modern approach invariably followed in these cases in our courts.

[26] A major issue in this case is the question whether there exists a duty on the bank to physically inspect the property offered to it as security to determine whether there are any other persons claiming to hold an interest in it, or to have an easement over it, or to have a dispute with anyone occupying it, which might affect the value or the marketability of the property. Counsel for the Claimant submitted that the failure of a bank to take reasonable care in checking the position of a person in occupation of the security property at the time of a mortgage would give protection to the person in occupation. She relied for this proposition on the case of **Barclays Bank plc v O'Brien [1993] 4 All ER 417**. That was a case where a businessman secured a business loan with the mortgage of the matrimonial home owned jointly by the husband and wife. The bank had prepared the necessary documents, which included a guarantee and legal charge to be signed by the husband and wife. The manager had given instructions to his staff that the husband and wife should take independent legal advice if they had any doubt. The bank staff responsible for arranging for the husband and wife to sign the documents did not follow the instructions. The husband signed the documents without reading them and the next day took them to the wife who also signed them without reading them. The company loan went bad and the bank brought proceedings to enforce payment under the guarantee. By her defence the wife contended that (i) the husband had put undue pressure on her to sign and that she had succumbed to that pressure; and (ii) that her husband had misrepresented to her the effect of the legal charge and that she had believed that it was limited to a small sum and that it would only last 3 weeks. The judge gave judgment for the bank. The wife appealed to the Court of Appeal, which found for the wife. On appeal to the House of Lords by the bank, it was held, quoting from the head note:

> Where a cohabitee entered into an obligation to stand as surety for the debts of the other cohabitee, including the debts of a company in which the other cohabitee (but not the surety) had a direct financial interest, and the creditor was aware that they were cohabitees, the surety obligation was valid and enforceable by the creditor unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor. If there had been undue influence, misrepresentation or other legal wrong by the principal debtor, then, unless the creditor had taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor would be unable to enforce the surety obligation because he would be fixed with constructive notice of the surety's right to set aside the transaction. However, unless there were special exceptional circumstances, a creditor would be held to have taken reasonable steps to avoid being fixed with constructive notice if he had warned the surety, at a meeting not attended by the principal debtor, of the amount of the potential liability and of the risks involved and advised the surety to take independent legal advice. On the facts, the bank knew that the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security documents of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank. The appeal would therefore be dismissed.

[27] In our case a personal home, not company property, was being offered to the bank as security for a debt owed by the company. The bank accepted the word of its

customer, the company, that only the company's managing director held any beneficial interest in the property being offered as security. Applying the above principles in the **Williams & Glyn's Bank case**, [supra], the **Lloyds Bank case** [supra], and in the **Barclays Bank case** to the facts in our case, the bank failed to take reasonable care, or any care at all, to check whether there was some other person with a claim of a beneficial interest in the property. If the bank had made a physical check of the premises, it would have discovered from the construction crew at the time of the construction or from the Claimant herself both during the construction period and after the construction had been completed, that she possibly held a beneficial interest in the property as a common law wife, and that she definitely held a beneficial interest as a person who had contributed financially to the purchase and construction of the property, and as a person who with the title holder held the common intention that she should hold a beneficial interest in the property although it was registered in the name of the husband alone. Although the businessman, in this case the 1st Defendant, held legal unencumbered title, it would have been the duty of the bank to have explained to the common law wife in those circumstances the implications of the husband giving the bank a legal mortgage over the property. It would further have been the duty of the bank to recommend to the Claimant that she take independent advice before she consented to the granting of the security by the 1st Defendant. It would have been necessary for the bank to ensure that the wife gave her informed consent to the granting of the security by the husband. To do otherwise than to make such enquiries and to take such care is for the bank to take a great risk. It is not as if there is anything new or radical in this finding. The court takes judicial notice of the fact that it is normal and usual for banks in the West Indies today in these circumstances to insist that the wife or sibling or parent, whom the bank reasonably suspects to have any beneficial interest in the security in question, and who might be subject to undue influence, should produce to the bank a certificate signed by independent counsel to the effect that he has acted as solicitor for the wife or sibling or parent, and that he has explained to him or her the meaning and effect of the security being offered to the bank, and that he or she either claims no

interest in the security or consents to the granting to the bank of the security by the legal owner of the property in question. The bank failed to take the steps that were necessary in these circumstances.

[28] Given the above findings of fact and the applicable law, the Claimant is entitled to the relief she seeks. There will be judgment for the Claimant for

(1) A declaration that she is a beneficial owner of one half share of the property described in deed No 3341 of 1998; and

(2) An injunction restraining the Defendants or either of them from selling or disposing of the property described in deed No 3341 of 1998; and

(3) Her costs against both Defendants to be assessed if not agreed.

I D MITCHELL, QC
High Court Judge