

CANADA / JUDGMENT

Cummings v. Chen

2023 BCSC 245

COURT

Supreme Court of British Columbia

DECIDED

17 February 2023

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2023 BCSC 245 Cummings v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cummings v. Chen,

2023 BCSC 245

Date: 20230217

Docket: E221234

Registry: Vancouver

Between:

James Stuart Cummings

Claimant

And

Annie Mei-Jy Chen

Respondent

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

(In Chambers)

Counsel for the Claimant:

S.L. Specht

Counsel for the Respondent:

S.S. Silber

Place and Date of Hearing:

Vancouver, B.C.

January 24, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 17, 2023

- [1] These are my reasons for judgment on an application by the claimant for interim exclusive occupancy of the family home in this family law matter.
- [2] For the reasons that follow, I dismiss the application.

Background

- [3] The claimant, James Cummings, is 59 years old and is a lawyer. He is semi-retired and in addition to practising law, has been involved in personal financial investments for himself and his family.
- [4] The respondent, Annie Chen, is 57 years old and was born in Taiwan. She moved to Canada in 1991. She was, up until recently, employed as an investment advisor with Scotia Wealth Management. She voluntarily retired from her employment post-separation, selling her book of business. Ms. Chen obtained a Master of Business Administration degree from the University of Calgary in 1995. Ms. Chen is also a licenced investment advisor with a Canadian Securities Course Certification. She is licenced to advise and sell insurance, options, and is a Certified Financial Planner.
- [5] The parties met in 2007. They began cohabitating in 2009. Both parties had been previously married and divorced. Mr. Cummings has two children from his previous marriage, now aged 28 and 23.
- [6] The parties separated on June 3, 2021.
- [7] The parties appear to have been financially autonomous throughout their relationship. They did not share accounts. They did not file taxes together.
- [8] In 2012, Mr. Cummings became aware of the Family Law Act, S.B.C. 2011, c. 25 [FLA] coming into force in 2013. He deposes that he discussed the issue with Ms. Chen. Following that discussion, the parties agreed that they would enter into a cohabitation agreement to confirm their separate finances. He was concerned about the upcoming changes to family law with the enactment of the FLA.

- [9] The parties differ in their evidence regarding the negotiations for the terms of the agreement. However, a cohabitation agreement was executed by the parties effective January 3, 2013 (the "Cohabitation Agreement") which set out that they would continue their status quo and each keep their own separate property as their own, regardless of any increase in value and that they would continue to remain financially autonomous.
- [10] Mr. Cummings drafted the Cohabitation Agreement. Ms. Chen obtained independent legal advice from an experienced family lawyer. She met with the lawyer twice to discuss the agreement. The draft agreement was changed by Mr. Cummings to reflect the changes requested by Ms. Chen. Attached to the Cohabitation Agreement is a substantial amount of financial disclosure between the parties, particularly on the part of Mr. Cummings.
- [11] The terms of the Cohabitation Agreement include that the Mr. Cummings pay all of the parties' shelter, shared food, vacation and health expenses above insurance. The agreement acknowledged that Ms. Chen could have full access to her income for the purposes of growing her own assets. The agreement also contains a provision which requires Mr. Cummings to indemnify Ms. Chen against any financial obligation for his children.
- [12] Ms. Chen's lawyer certified as to advice given, execution under no apparent duress and understanding the terms, and the respondent certified that she was provided with legal advice upon receiving a thorough review of the agreement from her lawyer. Ms. Chen deposes that she did not fully understand the terms of the Cohabitation Agreement due to her poor understanding of the English language and that she told her lawyer that she did not need to understand its terms. The lawyer made no corresponding notation of this very significant statement, which contradicts the certifications. Ms. Chen also deposes she only signed the agreement because the claimant stated he would end their relationship if she refused to sign it.
- [13] It appears that the terms of the Cohabitation Agreement were followed during the relationship. During the course of the parties' relationship, Ms. Chen's assets grew from approximately \$250,000 to over \$5,000,000.
- [14] The parties executed a supplemental cohabitation amending agreement dated April 23, 2014 that addressed the purchase of a property in West Vancouver (the "Property") by Mr. Cummings, which was expressly agreed under its terms to be his sole property (the "Amending Agreement"). A separate loan agreement was executed between the parties that day regarding a loan of \$500,000 from Ms. Chen to Mr. Cummings to aide in the purchase of the Property. Interest was charged at the rate of 3%. The Property was initially purchased through a trust, and was transferred directly into Mr. Cummings name in 2019. Ms. Chen submits that the change in title was due to Mr. Cummings promising to marry Ms. Chen, which Mr. Cummings denies. Mr. Cummings submits that the change in title was for tax planning purposes.

- [15] Mr. Cummings repaid Ms. Chen's loan, with interest, in June 2020. The terms of the loan documentation set out that the loan did not constitute any form of contribution to the Property for which the respondent could make a claim.
- [16] Ms. Chen did not obtain independent legal advice regarding the loan and Amending Agreement.
- [17] Ms. Chen did not contest the terms of the agreements during the relationship. During that time, she continued to purchase properties in her own name which she rented out and from which she solely received all of the net income.
- [18] Mr. Cummings deposes that, as a lawyer and knowing his professional and ethical obligations, he took particular care to encourage Ms. Chen to obtain independent legal advice for each transaction and he did not offer her any legal advice or assurances so that any reliance on him could be alleged. He submits that as a financial professional he had no reason to doubt Ms. Chen's ability to understand the purpose, intent or wording of the agreements that the parties entered into.
- [19] Mr. Cummings formally ended the parties' relationship on June 3, 2021. He deposes that tensions between Ms. Chen and Mr. Cumming's children had continued to increase over the years, to a point that became intolerable to him. As required by the Cohabitation Agreement, Mr. Cummings provided written notice of the end of the relationship by email. He left the Property temporarily, he submits, in order to provide Ms. Chen with time to organize her affairs and move out. His notice email set out that Ms. Chen could reside in the Property until one of her own rental apartments became available, or August 31, 2021, whichever was sooner.
- [20] Ms. Chen has not left the Property. She has sold two of her rental properties, one of which was located in Vancouver. She retired in March 2022. She has sold her book of business and receives \$30,000 monthly until the end of October 2024.
- [21] Mr. Cummings resides in a rental property in Vancouver and has not returned to the Property to live.

Litigation History

- [22] On June 13, 2021, Ms. Chen filed a Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246 charge against the Property. Through her lawyer she asserted that she would not be leaving the Property.
- [23] On April 7, 2022, the parties attended mediation but no resolution was reached.
- [24] On May 6, 2022, Mr. Cummings filed the Cohabitation Agreement in court.
- [25] On May 16, 2022, Mr. Cummings, through his lawyer, demanded that the respondent vacate the Property immediately.

- [26] On May 19, 2022, Mr. Cummings demanded Ms. Chen honour an agreement they had with regard to funds he managed on her behalf in trust, which he sold at her direction and which attracted a tax liability for him. He sought reimbursement for the tax liability, which before the end of the relationship she adhered to. Ms. Chen denied any liability and advised all further communication to go through legal counsel.
- [27] On June 9, 2022, Mr. Cummings filed a notice of civil claim against Ms. Chen seeking payment of the tax debt of \$132,778. On June 30, 2022 he obtained a garnishing order for the debt. Attempts to serve her at the Property in August 2022 were unsuccessful.
- [28] On August 19, 2022, Ms. Chen filed a notice of application to set aside the garnishing order or stay the proceedings until the enforcement of the Cohabitation Agreement is resolved. The application is still outstanding.
- [29] On October 13, 2022, Mr. Cummings filed an application to enforce the Cohabitation Agreement and Amending Agreement within the file reserved for the filing of the agreements. At the direction of the Court, Mr. Cummings filed a separate notice of family claim in this matter, and an application for exclusive occupancy is brought. That is the application now before me.
- [30] On November 29, 2022, Ms. Chen filed a response to family claim and counterclaim, seeking to set aside the agreements as being procedurally and substantially unfair, as well as seeking spousal support.
- [31] On December 2, 2022, Mr. Cummings filed his response to counterclaim.
- [32] No trial dates are set.

Exclusive Occupancy Under s. 90 of the Family Law Act

- [33] Section 90(2) of the FLA provides for the granting of temporary orders for exclusive occupancy of a family residence. "Family residence" is defined in s. 90(1) of the FLA as "a residence that is (a) owned or leased by one spouse or both, and (b) the ordinary place of residence of the spouses." Neither party disputes that the Property is a family residence.
- [34] The parties agree that the onus of proof is on Mr. Cummings as the applicant and that to be granted exclusive occupancy, under s. 90(2) of the FLA he must show that:
- a) it is a practical impossibility for the spouses to have shared use of the Property; and
 - b) on a balance of convenience, the claimant is the preferred occupant: *Ferguson v. Ferguson*, 2014 BCSC 216 at para. 62; *Glowacki v. Nesbeth*, 2021 BCSC 535 at para. 69
- [35] The granting of such an order does not grant to a spouse a proprietary interest in the residence: s. 90(3)(b).

- [36] Mr. Cummings further submits that the existence of the Cohabitation Agreement and Amending Agreement, and the presumption of their validity, should be factored into the consideration of the factual matrix at play between the parties and their claims. For this principle he cites: *Priebe v. Baker*, 2022 BCSC 306. In that case, the Master found that the fact that there was lack of any evidence before her that the agreement was unfair was a factor that can weigh in the consideration of an application for exclusive occupancy: *Priebe* at para. 71.
- [37] Here, Ms. Chen has deposed to her lack of understanding of the agreement terms, alleged incompetent legal advice, conduct by the claimant she alleges placed her under undue duress, and provision of household and family support as grounds for her claim that the agreements should be set aside. It would appear at this early stage in the proceedings and evidence that the respondent's circumstances have not been negatively affected by the terms of the agreements and, if anything, she has benefitted significantly from their terms. While her claims may have little merit to them, this is not analogous to the situation in *Priebe* where no evidence was advanced in support of the respondent's claim to set aside the agreement.
- [38] Section 90(2) of the FLA is quite clear. An order for temporary exclusive occupation does not impart any proprietary interest in an occupant. In these circumstances, I do not see the existence of the agreements and the presumption of validity accorded to them under the FLA as being significant factors for consideration in this application between these parties.

Is there a practical impossibility to shared use of the property?

- [39] The onus is on the party seeking exclusive occupation to first establish that the shared use of the family home is a practical impossibility. The practical impossibility test is an objective test, not a subjective one: *Dennis v. Regehr*, [1996] B.C.J. No. 237, 1996 CanLII 2392 (S.C.) at paras. 44-45.
- [40] The legal threshold for practical impossibility is a high one. Incompatibility of the spouses is insufficient. Although spouses may be leading separate lives under the same roof in an unpleasant and acrimonious manner, shared use of the home may still not be considered a practical impossibility: *N.N.N. v. D.E.B.*, 2016 BCSC 1778 at para. 27.
- [41] In *Glowacki* at para. 71, this Court considered *Evans v. Mahtoy*, 2015 BCSC 2141 at para. 28 and held that the FLA's increased focus on family violence has impacted the first branch of the exclusive occupancy test. Namely, the immediate question is whether there has been, or if there is likely to be, family violence. The Court stated:

- [71] Under the first part of the test [is shared use a practical impossibility], there must be something more than the parties simply having differences and not wanting to live together. There must be something which makes the situation intolerable or unacceptable in an objective sense. See *Wilson v. Wilson*, 1995 CanLII 1445 (BCSC) at page 17-18 citing *Graham v. Graham* (unreported) 1990 B.C.J. No. 1151 - Prince George Registry No. 18882 (BCSC) at page 5.
- [42] The court in *McMaster v. Knutson*, 2022 BCSC 2149 at para. 51, reiterated that there must be something more than the parties simply having differences and "not wanting to live together. There must be something which makes the situation intolerable or unacceptable in an objective sense".
- [43] There is no allegation of family violence between the parties. Mr. Cummings deposes that he is fearful of Ms. Chen's reaction to him and has generally stayed away from the Property to avoid confrontation. He cites Ms. Chen's changing of the locks on the Property in October 2021 as an example of her actions rendering shared occupation impossible. He also states that his children would not be comfortable visiting or staying over with him in the Property if Ms. Chen was also occupying part of it due to her rude and confrontational behaviour to them in the past. He is concerned that Ms. Chen is simply holding him hostage to some extent and using her occupation of the Property as a bargaining chip in their dispute. Mr. Cummings fears that Ms. Chen will make allegations against him which will damage his professional reputation if he returns to the Property alongside her. He is already concerned that Ms. Chen's statement that he told her she did not require legal advice on the loan agreement and that she only needed a lawyer to rubber stamp the Cohabitation Agreement are examples of this behaviour. Mr. Cummings also notes that the parking/driveway for the Property requires any second car to be stacked and does not accommodate side-by-side parking. Cooperation would be required in that case if both cars were to use the Property for parking.
- [44] Ms. Chen deposes that while she is experiencing depression as a result of the breakdown of the relationship, she does not see their sharing the Property as a practical impossibility.
- [45] The Property consists of two entrances, one through the main level front door and the other through the garage, and three bedrooms and a den. One entrance leads to the main floor living area, kitchen, master bedroom, and bathroom suite, consisting of 1,600 square feet. There is a 300-square-foot den/office on the upper top floor. Another entrance leads to the lower level, which contains two bedrooms, a full bathroom, and a laundry room which is approximately 850 square feet in total. Ms. Chen submits a refrigerator and stove could be installed in the lower level. However, Mr. Cummings is concerned that zoning and bylaw issues would arise if a stove was installed. He also notes that the staircase between the lower level and main level is a floating staircase, with no doors at either level and a glass wall on the upper level limiting any privacy between the floors.

- [46] Ms. Chen's position is that given the size and layout of the Property, the parties could reasonably reside on different floors and each have their own bedroom, bathroom, and kitchen or partial kitchen facilities. The laundry room would be the only shared area. One party could park their vehicle on the street.
- [47] She submits that pending trial, the parties could reasonably co-reside in the large property with little or no direct contact with one another. She is willing to reside on either the main/upper floor or the lower floor of the family home.
- [48] While I can sympathise with Mr. Cummings and his wish to avoid confrontation, that does not meet the high bar set under s. 90 for exclusive occupancy. Fear of possible inappropriate behaviour and uncomfortableness do not create a practical impossibility.
- [49] If Mr. Cummings resumes occupying the Property along with the respondent, I will order that they primarily reside in different areas of the Property as follows.
- [50] Ms. Chen will reside in the lower level of the Property. She will enter and leave the Property through the lower level garage area. She will have access and use of the garage/parking area for her vehicle. She is content with establishing a cooking facility in the lower level. It can consist of a refrigerator, hot plate and microwave so long as they do not require electrical upgrades. She will not have access to the main or upper levels of the Property. Ms. Chen will provide Mr. Cummings with a set of keys for the new locks.
- [51] Mr. Cummings will reside in the main and upper levels. He will enter and leave through the main level. He may only access the lower level of the Property for the purpose of using the laundry facilities twice a week. If the parties are unable to agree amongst themselves what those times will be, I make the order that it will be Tuesday between noon and 3:00 p.m. and Saturday between 9:00 a.m. and noon. Mr. Cummings will not park his vehicle on the driveway or in the garage area.
- [52] The parties are ordered to avoid contact with each other wherever possible and within the confines of this order. Neither party may change the locks to the Property without the consent of the other or further order of the Court.
- [53] If Mr. Cummings chooses not to return to reside in the Property pending resolution of the litigation, then Ms. Chen is responsible for all utilities and maintenance costs for the Property such that it is maintained to a high standard and does not go to waste, including the yard area.
- [54] As I have found there to be no impractical impossibility of joint occupancy, I will not go on to examine the balance of convenience favouring one party over the other for exclusive occupancy.

Conclusion

- [55] The claimant's application for exclusive occupancy is dismissed.

"Wilkinson J."

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