

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA (Civil) 36/2013

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
(D168/2002)

BETWEEN

LEBERT JOHNSON

Appellant/Respondent to Petition)

-and-

GARDEAN JOHNSON

Respondent/Petitioner

Conor Fee of Samson & McGrath appeared for the Appellant, Lebert Johnson
Ms Keva Reid appeared for the Respondent (Petitioner), Gardean Johnson

Hearing:: 21 August 2014
Judgment delivered: 21 August 2014

JUDGMENT

Revised from transcript and Approved released 10 September 2014

Sir John Chadwick, President:

1. This is an appeal from an order made by Justice Quin on 29 October 2013 in matrimonial proceedings brought by Gardean Johnson, to whom I shall refer – without intending discourtesy or disrespect - as the wife, and Lebert Johnson, whom I shall call the husband.

2. The marriage between the parties ended some years ago. On 17 February 2006 Justice Levers made an order by consent in ancillary relief proceedings. The first paragraph of that order provided for the custody and control of the child of the marriage (who is now over the age of 18 years). The second paragraph provided for the payment of maintenance in respect of that child until she completed full-time education or attained the age of 21 years, whichever was the sooner. The third paragraph was in these terms:

“That the apartments registered as West Bay northwest block 4D parcel 67 be transferred to the husband. The husband is to be responsible for the mortgage payments presently owed to the Bank of Nova Scotia and to have the same apartments held as security for the said mortgage. The matrimonial home located at West Bay northwest block 1D parcel 223 is to be transferred to the Petitioner/wife free of any charge to the aforementioned bank.”

For convenience, I shall refer to block 1D parcel 223 as “the wife's property” and to northwest block 4D parcel 67 as “the husband's property”.

3. At the time of the consent order made on 17 February 2006, each of the two properties was in the joint names of the husband and the wife; and the two properties were subject to a mortgage to secure a loan made to the husband and the wife, jointly, by the Bank of Nova Scotia. At that time, we were told, the outstanding loan was in the region of CI\$180,000. It is clear that the intended purpose of paragraph 3 of the consent order was that the wife would become the owner of the wife's property (parcel 223) free of any charge to the bank: and that the husband would become the owner of the husband's property (parcel 67) encumbered by the liability to the bank.
4. Since the order of February 2006 the wife's property (parcel 223) has been transferred into the wife's sole name; but it remains subject to the mortgage to secure the loan from the Bank of Nova Scotia; of which, we were told, some CI\$156,000 remains outstanding. The husband's property (parcel 67) is still in joint names; but the wife is ready and willing to transfer of her interest (if any) in that property to the husband.
5. The present position therefore is that the wife's property remains subject to the mortgage in favour of the Bank; but it is the husband's responsibility to make the mortgage payments due under that mortgage. The husband's property also remains subject to that mortgage.

6. The husband failed to make payments to the Bank which were due under the mortgage. His position was that he had fallen on hard times and was not able to do so. That put the wife's property at risk of enforcement proceedings by the Bank as mortgagee.
7. In those circumstances the wife issued a summons, dated 19 June 2013, seeking enforcement of the 2006 consent order. In particular, she asked that the husband be found in contempt and committed to prison; or, in the alternative, that the husband should pay all the arrears due under the mortgage and/or repay her all sums paid by her to bring outstanding mortgage payments up to date; and, further, that he should comply with an earlier order made by Justice Quin on the 10 October 2009 for outstanding sums due. She sought an order that the former matrimonial home - that is to say, parcel 223 - be removed as security for the loan from the Bank; and that she be granted control of the husband's property (parcel 67) until the mortgage was discharged.
8. The obvious solution to the problem that the wife's property remained subject to the mortgage - and so at risk if the mortgage payments were not made by the husband - was to persuade the bank to vary the loan arrangements: so that the husband's property - the value of which was, we were told, some CI\$220,000 or thereabouts - stood as sole security for the loan. On the basis that the balance of the loan outstanding is CI\$156,000, there would be a loan to value ratio of some 70%: that is to say, there would appear to be sufficient value in the husband's property to provide security for the loan without the need for the wife's property to be included in the security arrangements.
9. The parties sought the bank's agreement to a variation of the loan arrangements. Justice Quin, himself, made very considerable efforts - including summoning officers of the bank to attend before him in chambers - to persuade the bank that that was a sensible way out of the problem. But, after consultation with its head office in Toronto, the bank took the view that, given the payment history in respect of this loan and the husband's perceived financial difficulties, it wished to retain the security that it already had. The bank was not prepared to release its mortgage over the wife's property while the loan remained outstanding. That was a commercial decision which the bank was entitled to take. The consequence of that decision was that the attempt to refinance through the existing

mortgage lender, the Bank of Nova Scotia, founded.

10. In those circumstances, when the wife's summons came before him on 29 October 2013, Justice Quin ordered that the husband's property (parcel 67) be put up for sale with a reputable real estate agent. He directed that paragraph 3 of the 2006 consent order remain in force - with the consequence that the husband remained responsible for the arrears and for the monthly payments due under the mortgage until completion of the sale of the property - and that, upon sale of the property (should the husband then fail to execute the transfer) the Clerk of the Court be empowered to execute the transfer.
11. Notice of appeal from the order of 29 October 2013 was given on 6 November 2013. It said that the husband asked the wife, through her attorneys, to agree to stay that order pending the current appeal, but she did not agree to a stay. But the order of 29 October 2013 did not specify who was to have conduct of the sale of the husband's property; and it appears that no progress has been made in giving effect to that order.
12. As originally served, the notice of appeal asked that the order of 29 October 2013 be set aside and be substituted with an order discharging paragraph 3 of the 2006 consent order. It has not been explained – perhaps, because there is no explanation that could be advanced – on what basis the husband thought that this Court could be persuaded to discharge paragraph 3 of the 2006 order. That was an order entered into by consent: the only change in circumstances is that it has turned out to be more difficult than may have been anticipated to obtain a release of the wife's property from the Bank's mortgage. The underlying purpose and intent of the 2006 consent order - that the wife should have parcel 223 free of the mortgage - remains.
13. The notice of appeal was amended on 17 July 2014. The husband now seeks from this Court an order for the discharge of paragraph 3 of the 2006 consent order:

“to the extent that it requires the appellant to be responsible for the mortgage payments owed to Scotiabank and requires him to have block 4D parcel 67 held as security for the mortgage and requires him to facilitate the removal of any charge against block 1D parcel 223”.

But, if the husband were to be no longer responsible for the mortgage payments and were no longer to be required to procure the released of the wife's property from the Bank's

mortgage, the underlying purpose and intent of paragraph 3 of the 2006 consent order would be defeated.

14. In his memorandum of grounds of appeal, dated 6 December 2013, the husband contended that the judge erred in fact and in law by making an order for the sale of the property that was his home without (it is said) providing the husband with any reasonable opportunity to argue his case against such a draconian order: in particular, it is said (i) that the judge ought to have given the husband the opportunity to file evidence and/or obtain legal representation for a full hearing of the question whether his property should be sold and (ii) that the judge was wrong to make such a draconian order in the absence of any evidence from the husband as to how such an order would impact upon him and upon his present wife and setting out why he had been unable to comply with the terms of the previous order.
15. In my view there is no substance in the complaint that the judge needed evidence as to why the husband had been unable to comply with the order that he procure that the Bank release the wife's property from the bank's mortgage. The judge knew perfectly well why the husband had not been able to comply with that part of paragraph 3 of the 2006 consent order: the husband had not been able to comply because he had not been able to persuade the bank to refinance the arrangement so as to release parcel 223 from the charge.
16. But there is some substance in the criticism that the judge made the order for sale of the husband's property without taking into account the possibility that the husband might be able to obtain refinancing arrangements from another lender. It may well be that, with the experience of being unable, himself, to persuade the Bank to vary the security arrangements in respect of its loan, the judge thought that refinancing through another lender was not a real possibility. Be that as it may, the judge's failure to give the husband the opportunity to attempt to obtain refinance from a another source is said to be so unfair that this Court should set aside the judge's order and remit the matter back to the Grand Court.
17. I find it difficult to avoid the conclusion that that submission is advanced in the hope that

this Court may be persuaded to allow this very unsatisfactory situation to continue - perhaps for another ten months or more – while the husband does nothing about obtaining refinance or selling the house in which he is living. That appears to me to be an unacceptable solution to the problem.

18. The circumstances which I have described in this judgment point clearly to the conclusion that there are only two ways by which effect can be given to the common purpose and intent of the parties when they agreed the terms in paragraph 3 of the 2006 consent order: either (i) the husband's property (parcel 67) is sold to realise what is said to be its current value of around CI\$220,000 - so that those proceeds can be used to pay off the Bank of Nova Scotia loan – or (ii) the loan be refinanced by borrowing from another lender secured only on the husband's property – so that the new loan can be used to discharge the Bank of Nova Scotia loan and so free the wife's property from its current encumbrance. Either the property has to be sold or the loan has to be refinanced.
19. Nothing in the material that has been put before this court suggests that the husband is likely to take any steps towards implementing either of those two possible solutions to the problem which has arisen by the Bank's refusal to release the wife's property from its security unless impelled to do so.
20. In those circumstances, the order which I propose that this Court should make is this: (i) the property is to be sold in accordance with the order made by Justice Quin on 29 October 2013; (ii) the wife is to have conduct of that sale; (iii) for that purpose she is to have the necessary access to and control of the property; (iv) no contract for sale is to be entered into, and no transfer upon sale is to be made, in relation to the husband's property until after the end of November 2014; (v) the husband may apply to this Court — and I emphasise that the application (if any) is to be made to this Court — at the beginning of its next regular session in November 2014 to vary that order; (vi) the application (if made) is to be supported by evidence demonstrating viable proposals for an imminent refinancing of the Bank of Nova Scotia loan on a basis which does not require the wife's property to form any part of the security for that refinancing. Those proposals may be based upon the wife's readiness to execute whatever documents are needed to enable the

husband's property (at present in the joint names of the parties), to form the sole security for that refinancing.

21. If the husband is able to satisfy this Court at the beginning of November 2014 that there are viable proposals for refinancing the existing Bank of Nova Scotia loan which will have the effect of releasing the wife's property from the existing mortgage within a short period - and by "short period" I mean by or shortly after the end of November 2014 - then the court may be persuaded to vary the order which it now makes. If not – and, in particular, if no application to vary is made - then the order will stand and the wife can effect a sale of the husband's property without further order. The proceeds of that sale will of course have to be paid, in part at least, to the Bank in order to discharge the mortgage which it now holds over the husband's property; and so enable that property to be transferred to a purchaser free of encumbrance. The effect of paying off the Bank of Nova Scotia loan will be that the wife's property (parcel 223) will cease to be encumbered by a mortgage as security for that loan.
22. The balance of any proceeds of sale of the husband's property are to be paid into court (subject to any agreement between the parties) so that there can be a final accounting between the parties. That accounting will take in payments (if any) which have been made by the husband in relation to insurance on the wife's property (parcel 223), any arrears of maintenance in respect of the child and any mortgage payments which have been made by the wife (either hitherto or hereafter in order to discharge her obligations to the Bank as a joint borrower or co-mortgagee).
23. I conclude by urging the husband to take seriously the observations that have been made in this Court. A policy of continued non-recognition of the common intent and purpose which underlies paragraph 3 of the 2006 consent order is unlikely to be to his advantage.

Elliott Mottley, Justice of Appeal:

24. I concur.

Sir George Newman, Justice of Appeal:

25. I agree.