



[2012] JMSC Civ. 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 06151

**IN THE MATTER OF AN
APPLICATION PURSUANT TO THE
PROPERTY (RIGHTS OF SPOUSES)
ACT 2004 FOR A DECLARATION OF
PROPERTY INTEREST**

BETWEEN	ROYSTON	JOHNSON	APPLICANT
AND	ANDREA COLE-JOHNSON		RESPONDENT

IN CHAMBERS

Ravil Golding for the applicant

Sherry Ann McGregor, Tavia Dunn and Deborah Dowding instructed by Nunes Scholefield DeLeon and Co for the respondent

**May 31, 2011, December 16, 2011, December 21, 2011, April 11, 2012 and October
12, 2012**

**PROPERTY (RIGHTS OF SPOUSES) ACT - DIVISION OF PROPERTY – WHETHER
HOUSE WAS WHOLLY OWED BY ONE OR BOTH SPOUSES – MEANING OF
WHOLLY OWNED**

SYKES J (DELIVERED BY McDONALD BISHOP J)

[1] Mrs Andrea Cole-Johnson is non-plussed by Mr Roy Johnson's, her husband, application. He is seeking a declaration that he is entitled to a fifty percent share in the house and furniture. He claims that it is the family home under the Property (Rights of Spouses) Act with the consequence that he is entitled to fifty percent of it. Mrs Cole-Johnson is appalled. Her response has been robust and to the point: Mr Johnson does not have any interest in the property because the house was not **wholly owned** by either her or her husband, or both of them. Consequently, she said, it does not fall under the Act.

[2] Section 2 (1) of the Act defines family home in this way:

*“family home” means the dwelling-house that is **wholly owned** by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor, who intended that spouse alone to benefit. (added emphasis)*

[3] Mrs Cole-Johnson has focused on the words '**wholly owned**' which, she says, have modified or restricted the meaning of the compound noun 'dwelling-house.' Mrs Cole-Johnson's point, made through her counsel Miss Sherry Ann McGregor and Miss Deborah Dowding, is that the expression 'family home' is not simply where the

family lived, whether habitually or from time to time as the statute says. It must be a dwelling-house that is '**wholly owned**' by either one or both spouses. It is agreed on all sides that the house in question was indeed where the parties lived as their principal or only family residence. The proposition advanced by counsel is that **wholly**, in this context means only, solely, exclusively or entirely. To spell it out in terms of classic syllogism, the reasoning of Mrs Cole-Johnson goes like this: (major premise) all houses classified as the family home must be '**wholly owned**' (meaning exclusively, entirely) by either one or both parties to the marriage; (minor premise) this house is not '**wholly owned**' by either or both parties; (conclusion) therefore, this house is not the family home. The major issue, and possibly the decisive issue, is whether Mrs Cole-Johnson has made good her submission. To answer this question, the evidence on the ownership will have to be examined.

Does Mrs Cole-Johnson or Mr Royston Johnson wholly own the house either solely or jointly?

[4] Mr and Mrs Johnson were married on December 22, 1990 at Santa Cruz in the parish of St Elizabeth. The parties had met some time in 1985/86 and thereafter developed an intimate relationship which culminated in marriage. The parties have now separated and Mrs Cole-Johnson has petitioned the court for a divorce.

[5] The property in question was acquired by transfer registered on September 22, 1999 in the names of Mrs Cole-Johnson and Mr Glenroy Cole, her brother. Mr Royston Johnson's name does not appear on any document related to the house.

[6] What led to this purchase? Mrs Cole-Johnson testified that she heard of a housing scheme being developed by the National Housing Trust (NHT) at Lydford, St Ann. The NHT is a statutory body which receives its capital for housing development from deductions made from the salaries and wages of the general working population in Jamaica. The persons whose salaries are affected in this way or who chose to contribute voluntarily are known as contributors. Each contributor is entitled to approach the NHT for money to assist with the purchaser of either (a) land; (b)

house; (c) the construction of a house or (d) a loan to improve a house he or she may have. Generally, if a person is not a contributor then he or she cannot receive any assistance from the institution. Any assistance from the NHT is called a benefit.

[7] When Mrs Cole-Johnson heard about the Lydford development, she and her brother were living at Mr Johnson's house at lot 51 Rose Hall in the parish of St. Ann. Her brother was working, at the time, as a security guard with Marksman Limited, a security company. She further testified that she and her brother discussed the possibility of purchasing the lot together and then building on it. It was Mrs Cole-Johnson's testimony that the purpose of buying the lot was to have a place where she could live. The house was completed and the family moved there in July 1997 (Mrs Cole-Johnson's evidence). The family lived at the Rose Hall property from the marriage to the time they moved to the Lydford property.

[8] Why would Mrs Cole-Johnson purchase property with her brother and not with her husband to make a house? The context of this surreptitious behaviour by Mrs Cole-Johnson is this: according to Mrs Cole-Johnson, her marriage was not going well because her husband was extremely abusive to her. She testified that her husband was quite abusive particularly when he consumed alcohol. This, she said, had been going on for several years. It got to the point where she felt sufficiently unsafe to apply to the Resident Magistrate's Court for a restraint order against her husband.

[9] Mr Johnson has admitted that his wife received the order. He, however, insists that his marriage was going well until 2008. Mrs Cole-Johnson denies this and states that it was bad for quite a number of years before 2008.

[10] In the normal course of things, wives do not seek protection from their husbands without very good reason. The fact that Mrs Cole-Johnson sought and obtained the order does suggest that she felt threatened enough to seek judicial protection from her husband. Usually, the application for an order of the nature Mrs Cole-Johnson received is the culmination of a long series of unfortunate events. It is not unknown for abused women to remain in abusive relationships, hoping that tomorrow will be a

new beginning. That new beginning did not arrive for Mrs Cole-Johnson. The fact that she accommodated her husband in the Lydford property and lived there with him for nearly twelve years might be used to say that she was not speaking the truth when she spoke about the deteriorating circumstances of her marriage. However, as stated earlier this kind of conduct is not unusual or strange for women who are abused. Indeed one could say that Mrs Cole-Johnson fits the profile of battered women who after many years finally pluck up the courage to leave and not return. This court accepts that there was abuse of Mrs Cole-Johnson and this acted as a catalyst for her to plan a possible means of living in peace while at the same time remaining in the relationship. Her evidence provides a credible explanation for purchasing the property in her and her brother's name.

[11] While the abuse was going on, Mrs Cole-Johnson obviously gave thought to the future and how to get out should the circumstance become very intolerable. This would suggest that the abuse started while the family lived at the Rose Hall property.

[12] A decision was finally made that she and her brother would purchase the lot in both their names. At the time of this decision, she testified, she did not have any money to make the initial payment and it was her brother who gave her JA\$5,000.00 to make the first payment.

[13] The rest of the purchase price was to be provided by way of a staff loan. Mrs Cole-Johnson was an employee of the NHT. This employment allowed her to apply for a NHT staff loan. There is documentation showing her application to the NHT in her capacity as an employee and not an NHT contributor. At the risk of repetition, Mr Johnson's name does not appear on the application as an applicant, despite his protestations to the contrary.

[14] Mrs Cole-Johnson exhibited the relevant documents which were:

- a. a document headed 'Application for Staff Loan' dated November 15, 1993 signed by Mrs Johnson alone. The document noted that

she was married. The document also noted that the first child was a dependent. She had applied for a loan of JA\$400,000.00. This was a loan to purchase the land (exhibit ACJ 1 of affidavit dated June 3, 2010);

- b. a letter dated January 30, 1994 from the NHT to Mrs Cole-Johnson telling her that she was granted a loan of JA\$706,000.00. This letter said that the loan was for construction of a housing unit (not numbered as exhibit but attached to affidavit dated February 25, 2010);
- c. a letter from NHT, dated March 28, 1994 to Mrs Johnson alone indicating that her loan application was successful. The court notes that the letter states that the sum was \$94,000.00 which was to be repaid over a period of twenty years at six percent. The letter also stated that a deposit of JA\$5,000.00 was needed. This reference is consistent with her testimony that her brother gave her JA\$5,000.00 to make the initial payment (exhibit ACJ 2 of affidavit dated February 25, 2010);
- d. a letter from NHT, dated October 5, 1995 to Mrs Cole-Johnson. The letter stated that the loan was for JA\$706,000.00. The letter dated 'this LC cancels ones dated 28/03/94 & 30/01/95.' Mrs Cole-Johnson says that this loan was to build the house on the land (exhibit ACJ 3 of affidavit dated February 25, 2010);
- e. a letter dated February 2, 1996 granting a further loan of JA\$600,000.00 for the construction of house on the land (exhibit ACJ 4 of affidavit dated February 25, 2010).

[15] Looking back the sequence of applications and letters it would be accurate to say the following:

- a. Mrs Cole-Johnson applied for a staff loan in November 1993;
- b. she was granted a loan in January 1994;
- c. an additional loan was granted in March 1994;
- d. by October 1995 both letters of credit referring to January and March 1994 loans were superceded by the October 1995 letter of credit;
- e. there was another loan in 1996.

[16] The testimony was not very clear on this but it appears that Mrs Cole-Johnson was granted two loans. There was the initial loan of JA\$94,000.00. There was a further loan of JA\$706,000.00 but the letter of October 5, 1995, explicitly stated that it canceled the letter of March 28, 1994 (the JA\$94,000.00 loan) and also canceled the letter of January 30, 1995 (the JA\$706,000.00 loan). Although the October 5 letter refers to the letter dated January 30, 1995, this must be an error because the letter actually bore the date January 30, 1994. Thus there was now a loan for a total of JA\$706,000.00 inclusive of JA\$94,000.00 loan. Then there was a second loan in 1996 for JA\$600,000.00. The purpose of both loans was to buy the land and build the house.

[17] There is evidence from Mrs Cole-Johnson that the loans were acquired in two capacities. She said loans were granted to her in her capacity as staff member and as an NHT contributor. What is clear, though, is that her first loan application was a staff loan application and the loan was granted as a staff loan. The court suspects that the lack of clarity on the loans stemmed from the point on which the claim was to be resisted, namely, the house was not exclusively owned by either or both parties, thus there need not be a complete explanation of the loans. Any explanation

given should go no further than make the point the Mr Johnson had nothing to do with the loans.

[18] In a February 12, 2012 affidavit Mr Johnson exhibited a number of documents including

- a. the same application for staff loan;
- b. a letter dated January 20, 1994, addressed to Mrs Cole-Johnson indicating that she was granted a further loan of JA\$706,000.00. This letter states in the last line that the offer expires April 28, 1995. It has at the top of it a typed line which read, 'This letter of commitment replaces one dated 28/03/94';
- c. a letter dated February 2, 1996, addressed to Mrs Cole-Johnson telling her that she had been granted a loan of JA\$600,000.00. This letter of commitment expired on May 2, 1996;
- d. copies of pages from passbook from National Commercial Bank with the names R Johnson and Andrea Cole-Johnson. The exhibited pages show the earliest date of December 15, 1993. They show a number of deposits and withdrawals.

[19] The first three documents exhibited by Mr Johnson do not differ in content from those exhibited by Mrs Cole-Johnson. The passbook pages were placed before the court to say that it is not the case that Mrs Cole-Johnson received money from her brother to make the payment because money was in the account which would have enabled her to make the payment.

[20] In relation to this account, the evidence from Mrs Cole-Johnson, when cross examined, was that it was her account at first and then later her husband's name

was added. It was suggested to her that it was a joint account from the beginning. She denies this. It is not clear when she paid the JA\$5,000.00 which she says she got from her brother. This factor assumed some importance for Mr Johnson because his point was that sufficient money was in the account (in excess of JA\$20,000.00 at times) and so there would be no need for her to take money from her brother. However, the passbook pages also show times when the balance was less than JA\$6,000.00. Therefore, there is no inevitable and necessary inconsistency between the evidence of Mrs Cole-Johnson on this point and the passbook pages.

[21] In seeking to explain away Mrs Cole-Johnson's documents and the inferences to be drawn from them, Mr Johnson said that he trusted his wife and she handled all the relevant documentation. Mr Johnson asserted that he recalled signing a loan application the proceeds of which were to be used to purchase the land in question. If this is so, then the implication is that Mrs Cole-Johnson submitted a new form with her name alone as the applicant.

[22] As against this explanation, there is Mrs Cole-Johnson's explanation that since she was applying for a staff loan, then by definition, Mr Johnson could not possibly be signing any such application since he was not a staff member at the NHT. Mrs Cole-Johnson's explanation on this point is more coherent than that of Mr Johnson. It makes sense and importantly, is consistent with the exhibited documents.

[23] Mrs Cole-Johnson added that the plan was that the ground floor would be hers and the second floor would belong to her brother.

[24] In response to Mr Johnson's insistence that he and his wife were supposed to be joint applicants to the NHT for loans, Mrs Cole-Johnson indicated that her husband could not have possibly applied, legitimately, for any loan regarding her and her brother's house because Mr Johnson had already benefited from a loan from the NHT in 1994. Mrs Cole-Johnson went so far as to say that her husband 'could not therefore participate in any other loans from the NHT in respect of the Lydford property' (paragraph 26 of affidavit dated February 25, 2010). In response to this, Mr

Johnson said that 'paragraph 36 is true save and except for the fact that I was never a beneficiary of a loan with the NHT until June 1994' (paragraph 31 of affidavit dated March 3, 2010). The significance of this is now explained.

[25] What is interesting here is that at some point before June 1994, Mr Johnson applied for a loan from NHT in his capacity as a contributor. The loan was granted in June 1994. This loan was in respect of his own property at Rose Hall. For Mr Johnson to have been granted a loan in June 1994, he must have applied for it sometime before. This means that he had to formulate the intention to apply for loan and then make the application. While the exact date of Mr Johnson's application is not known what is clear is that had he done so before Mrs Johnson make her application in November 1993, he could not possibly be a joint applicant with his wife because the NHT rules prevent one person having two benefits or loans simultaneously. If he had in fact applied for the loan with Mrs Cole-Johnson as he alleged then it is extremely unlikely he would have received another benefit in June 1994 because of the rule against one person having more than one simultaneous benefit from the NHT.

[26] This makes it extremely unlikely he would have made a joint loan application in respect of the Lydford property at a time when he had either formed, or was in the process of forming the intention to apply for a loan for the Rose Hall property. Had he been a joint applicant in respect of the Lydford property, then, as Mrs Cole-Johnson explained, it would be unlikely he would have applied for a benefit in respect of the Rose Hall property. Therefore, even on the assumption that Mr Johnson could have been a joint applicant in respect of a loan for the Lydford property, having regard to the fact that he actually received a loan in June 1994, it is unlikely that he would have been a joint applicant in November 1993 (the date of Mrs Cole-Johnson's first application) because he would have known that he intended or had in fact applied for an NHT loan and he would have known that he could not have had two loans from the NHT.

[27] Additionally, having regard to Mr Johnson's response to his wife's reasons why he could not have received the loan, it means, as far as the pleadings and evidence were concerned, that (a) Mr Johnson had accepted that he received an NHT loan in 1994 and (b) he was unable to apply for any other loan. In other words, he has accepted his wife's factual assertion and the reasons in support of the assertion that he could not have applied for any other NHT loan. The consequence of this is that Mr Johnson's case that he and his wife were joint applicants for a loan in respect of the Lydford property is simply not probable.

[28] Thus far in the analysis Mrs Cole-Johnson has, in the view of this court, produced a more coherent reliable account of how it is that her brother's name and hers appear on the registered title. It is far more internally consistent and more consistent with the external evidence (documents) than Mr Johnson's.

[29] Mr Johnson has not produced any documentation or provided a reliable account capable of persuading the court that he made a joint application to the NHT for a loan to purchase the property.

[30] Even if, as Mr Johnson asserts, his wife's brother could not have provided the JA\$5,000.00 to Mrs Cole-Johnson and he contributed nothing to the purchase of the property, the fact is that his name appears on title and prima facie he has both a legal and equitable interest. Mr Cole was not a party to these proceedings. It would be unwise for the court to make a finding adverse to him when (a) he was not a party to the proceedings and (b) no one sought to make him a party and (c) his account has not been heard from him.

[31] At the very least, Mrs Cole-Johnson would be making a gift to her brother of the legal and equitable interest. The consequence of this is that the property was not '**wholly owned**' by Mrs Cole-Johnson and neither was it wholly owned by Mrs Cole-Johnson and her husband despite the fact that it was the principal place for the family to live.

[32] On the question of repayment of the mortgage, Mr Johnson put forward the view that after he and his family moved to the disputed property, his own property at lot 51 Rose Hall, Montego Bay, was rented. The rental sum was used to pay the mortgage or contributed to the mortgage payment of the disputed property.

[33] This assertion was put to the test of cross examination. Mr Johnson accepted that his wife made the mortgage payment by way of salary deduction from her salary alone. This was followed up by Mrs Cole-Johnson's evidence that the rent was used to meet ordinary household expenses. Again, there is no documentation consistent with Mr Johnson's testimony.

[34] Mr Johnson also testified that he did not know until 2008 that his wife's brother's name was on the title to the property. In light of the circumstances and reasons for the acquisition of the property, it was not surprising that Mr Johnson would be in the dark on the question of whose names were on the title. This is quite consistent with the evidence given by Mrs Cole-Johnson.

[35] Mr Johnson's claim for half the furniture is dismissed. No evidence was presented on that issue.

[36] Turning now to Mrs Cole-Johnson's claim for compensation from her husband who forced her out of the property. When the hearing of Mr Johnson's claim began, Mrs Cole-Johnson's application was not before the court. In fact it was filed the day following commencement of this hearing. It was not part of the hearing and will have to be heard in separate proceedings.

[37] On a somewhat sombre note, the court wishes to point out that no final submissions were received on Mr Johnson's behalf. The court had made orders at the end of the hearing in April this year regarding the filing of final submission. The submissions should have been filed by April 30, 2012. Five months later no submissions were filed. The court could not delay any longer particularly where Mrs

Cole-Johnson is out of the house which is occupied by Mr Johnson who has no legal or equitable interest in the disputed property.

Conclusion

[38] The conclusion from all this evidence is that the property was not **'wholly owned'** by Mrs Cole-Johnson. She and her brother together decided to acquire the property and build on it. Therefore the property was not owned solely or exclusively by Mrs Cole-Johnson or her husband or both of them and so was not the family home within the meaning of the statute. This being so there is no need to examine the rest of the evidence in the case. The claim was not contested on an alternate basis, that is to say, the claim did not require the court to consider whether Mr Johnson's claim was sustainable on normal equitable principles outside of the legislation.

Disposition

[39] Mr Johnson's claim under the Property (Rights of Spouses) Act is dismissed in its entirety with costs to Mrs Cole-Johnson to be agreed or taxed. Mrs Cole-Johnson's claim to be heard in a separate hearing.