

Privy Council Appeal No. 21 of 1991

Christopher Dorrien Johnson

Appellant

v.

Carolyn Eva Johnson

Respondent

(and Cross-Appeal)

FROM

THE COURT OF APPEAL OF THE  
CAYMAN ISLANDS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
6TH APRIL 1992  
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*Present at the hearing:-*

LORD TEMPLEMAN  
LORD BRIDGE OF HARWICH  
LORD BRANDON OF OAKBROOK  
LORD GRIFFITHS  
LORD MUSTILL

*[Delivered by Lord Griffiths]*

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This is an appeal by Christopher Dorrien Johnson ("the husband") and a cross-appeal by Carolyn Eva Johnson ("the wife") from an order of the Court of Appeal of the Cayman Islands which allowed the husband's appeal from the order of Harre J. made in respect of the wife's application for ancillary relief under section 21 of the Matrimonial Causes Law (Law 9 of 1976), to the extent that the sum that the wife was ordered to pay to the husband in respect of the transfer to her of a property known as the waterfront property was increased from US\$59,046 to US\$350,000.

The husband, who is English, is a partner in a firm of chartered accountants. The wife is Canadian and a business woman of considerable ability. The parties were married on 22nd October 1976 and had two children, Robert born on 20th August 1978 and Winston born on 9th March 1980. The husband, who has lived in the Cayman Islands since about 1969, has Caymanian status, the wife lost her Caymanian status on divorce.

The marriage broke down in 1985, the wife left the matrimonial home on 5th August 1985 and served a petition for divorce on 7th August 1985. In 1987 there

were contested custody proceedings which resulted in custody, care and control of the two children being awarded to the wife. Harre J. commenced the hearing of the wife's summons for ancillary relief, which sought an order for disposition of the matrimonial property, including the matrimonial home, on 25th July 1988. The matrimonial assets were of considerable value, the hearing was clearly bitterly contested and lasted for twelve days. The reserved judgment was delivered on 19th January 1989.

The husband appealed to the Court of Appeal. The Court of Appeal after a hearing lasting four days in September 1989 reserved judgment. The Court of Appeal, by an order dated 8th December 1989, varied the order of the trial judge by increasing the sum to be paid by the wife in respect of the waterfront property from US\$59,046 to US\$350,000. However the Court of Appeal did not hand down their reasons for this order until 7th June 1990.

Their Lordships wish to state at the outset of this advice that it is only in wholly exceptional circumstances that the Judicial Committee will be prepared to entertain an appeal from a decision adjudicating upon the distribution of matrimonial assets at the end of a marriage. The detailed investigation of the figures, necessarily involved in the exercise of that discretion, is wholly unsuitable for the appellate function of this Board which is concerned in matters of this kind with the correction of egregious errors of law and substantial miscarriages of justice. The exercise of the discretion involved in an order made under sections 18 and 21 of The Matrimonial Causes Law (Law 9 of 1976) is to be carried out by the judge of first instance. If he has erred either as a matter of law or mixed fact and law, an appeal will lie under section 24 to the Court of Appeal. The Court of Appeal has the responsibility of reviewing the decision made by the trial judge. If they decide to alter the judge's order there the matter must rest. It is not the function of this Board thereafter to review all the evidence to see whether they might have taken a different view of the evaluation of the many factors involved in such a decision.

The local courts with their knowledge of local conditions are far better equipped to embark on the analysis of fact and the evaluation of the needs of the parties and their children which are essential to arriving at a fair decision. These matters must be left to the local courts working under the guidance of the local Court of Appeal.

It is therefore necessary to look with some care at the sequence of events which led the Committee in this case to take the exceptional course of giving leave to appeal after it had been refused by the Court of Appeal.

During the course of their marriage, the husband and wife cooperated in a number of business ventures. They chose to operate these through private limited companies. Indeed they seem to have conducted all their affairs through companies, even their matrimonial home was owned by a company of which they were the shareholders.

One such company was Old Island Trading Limited (OIT) through which the wife carried on a highly successful retail shop selling to the many tourists who visit George Town. Two thirds of the shares in this company were allocated to the wife and one third to the husband. At the beginning of 1985 they decided to buy three shops on the harbour frontage in George Town. This was a prime site for the tourist retail trade and it was intended that OIT would trade from the shops and thus expand its business. The property was acquired through Waterfront Investments Limited ("Waterfront") in which 70% of the shares were allocated to the husband and 30% to the wife.

However, before OIT moved into the waterfront shops the parties parted and their business relationship ended. The husband caused Waterfront to grant leases on two of the shops to another company and a third shop was still occupied under an existing lease. OIT has therefore not yet traded from these shops. There is, however, no statutory protection for business tenants in the Cayman Islands and the leases will end in the fairly near future.

In these circumstances the judge decided that the husband's shares in OIT should be transferred to the wife, that the wife's shares in Waterfront should be transferred to the husband, but that Waterfront should transfer to the wife the harbour shops subject to the outstanding mortgages upon them. This would secure the OIT business for the wife and provide premises from which she could continue to trade and support herself or alternatively an asset that she would be able to sell if for any reason she ceased her retail business activity. It should be said that there are uncertainties about the wife's prospects as a business woman in the Cayman Islands because of the loss of her status as a Caymanian.

The judge made orders in respect of the matrimonial home and other assets upon which it is not necessary to comment. In the Court of Appeal the real battle between the parties was again focused on the ownership of OIT and the waterfront property. In their judgment the Court of Appeal reviewed the judge's findings and approved of his order transferring OIT to the wife. They said:-

"However, in pursuit of a clean break he ordered that appellant transfer his share in OIT to the respondent.

In our view, having regard to the wife's shareholding, her role in the business, and the post-separation improvements which were entirely due to her efforts, the order of transfer was fair and reasonable."

The Court of Appeal also examined the judge's reasons for ordering the waterfront property to be transferred to the wife and said:-

"In so finely balanced a question, we cannot say that the learned judge erred in his reasoning or his decision."

However, in reflecting the financial consequences of transferring the waterfront property to the wife, the Court of Appeal asked themselves "whether this tipped the scales manifestly and inordinately in favour of the respondent (the wife)". After reviewing the financial consequences, the Court of Appeal concluded that the judge had not given the weight they deserved to certain payments made by the husband to service the waterfront loans security for the repayment of which had been transferred to the matrimonial home and another company Y.P. Because the judge had some anxiety about whether his order would work out fairly he had given leave to apply in case any adjustments were required. He expressed himself thus:-

"Mr. Johnson has one pressing need. It is that he should not be subject to undue liquidity problems, particularly in the short term, in relation to the secured loans which he will still have responsibility to repay even after the transfer of the waterfront property to his wife. That is a factor which caused me some concern and is the main reason for my having included in my order an express liberty to apply as to the time limits appropriate for the implementation of the order and any adjustments required by reason of movement of funds since the date of the hearing."

The Court of Appeal, having quoted that passage, said:-

"In the circumstances, we consider this liberty to apply as inadequate compensation. On general principles and, a fortiori, from the nature of the proceedings, conclusive orders, where possible should be made with a view to the cessation of litigation. We are of the view that this order for transfer of the waterfront premises has resulted in the scales being weighed down in favour of the respondent to an extent that merits adjustment and that extent is ascertainable."

Thus far their Lordships can perceive no error of law in the approach of the Court of Appeal. They were entitled to endorse the judge's decision to award OIT and the waterfront properties to the wife, and if they concluded that this resulted in an unfair advantage to

the wife or, to use their own words, tipped the scales inordinately in her favour, they were entitled to redress that balance by ordering the wife to pay an additional sum to that ordered by the judge. The sum they ordered the wife to pay was US\$350,000, and she paid it. If the matter had rested there, there could have been no possible ground for granting leave to appeal from the decision of the Court of Appeal.

The Court of Appeal made their order in December 1989. However, when they came to give their reasons seven months later in June 1990, they made a logical and mathematical error in the calculation by which they arrived at the sum of US\$350,000. They took the value of the waterfront property, after deducting the mortgage, as US\$460,000. The husband's interest they took to be 70% in accordance with his shareholding, namely US\$322,000. They added to this the figure of US\$226,000 which were payments made by the husband towards repayment of interest and capital on the loan, making the sum of US\$540,000. From this figure they deducted first US\$60,000 which they assessed as the loss caused to the wife by her inability to trade from the waterfront property because the husband had improperly leased the property after the judge's order awarding the waterfront property to the wife, and finally they deducted US\$138,000 which represented the wife's one third interest in the equity. If the Court of Appeal wished to arrive at the figure of US\$350,000 in isolation from the overall effect of the distribution of the assets, it had made a manifest error in deducting the value of the wife's one third share from the sum she should pay to the husband. If she was to have the waterfront property, on this arithmetic she should pay the husband the value of his equity plus the balance that he had spent servicing the loan on her behalf after deducting her loss of US\$60,000. This would give a figure of US\$488,000.

The husband therefore applied to the Court of Appeal for clarification of the effect of their judgment. At a hearing on 7th August counsel for the husband pointed out the error in the Court of Appeal's judgment and asked for it to be corrected. The Court of Appeal declined to alter their judgment and refused leave to appeal to the Privy Council.

It is against this background that their Lordships heard the husband's application for leave to appeal to the Privy Council. Appended to the petition for leave was a note, taken by the husband's junior counsel, of the hearing before the Court of Appeal on 7th August. According to that note the President is recorded as saying "We said all other assets balanced out and then did an exercise with Waterfront alone" and later "If court of view that an error was made, does court have power to amend", and "If this does not work, error has to be corrected somehow. Question of discretion

whether we allow matter to go further". And Henry J.A. said "The correct answer is for the wife to pay the husband US\$488,000 on the basis of our judgment". The author of the judgment Kerr J.A. is not recorded as contributing to the discussion, although he may well have done so. The Court of Appeal did not give their decision at the end of the argument on 7th August but adjourned to 9th August, on which date they refused a stay of execution on their judgment and refused leave to appeal to the Privy Council.

As matters had rested at the end of the hearing on 7th August, the note of counsel would have led one to expect that the Court of Appeal would either have corrected the mathematical error in their judgment and ordered the wife to pay an additional US\$138,000 or alternatively if they felt they had no power to do so they would have given leave to appeal to the Privy Council so that their judgment could be corrected on appeal. It was to look into this apparently surprising state of affairs that the Committee took the exceptional course of granting leave to appeal in a case of this nature.

When the appeal was opened it soon became apparent that the husband had no real interest in correcting the judgment of the Court of Appeal to the extent of receiving a further US\$138,000, and indeed his counsel described that as his fall back position. The object of this appeal has been to attempt to persuade their Lordships that both the trial judge and the Court of Appeal were wrong to award the waterfront property to the wife. The husband has already frustrated the wife's wish to trade from the property by granting leases in circumstances that were criticised by the Court of Appeal, and this is a further, and let it be said final, attempt to deprive the wife of the waterfront property. Their Lordships can find no ground whatever to differ from the decision of the courts below that the waterfront property should be awarded to the wife.

There remains the question of how much the wife should pay to the husband to balance the advantage of receiving that property. As his fall back position the husband says US\$488,000; on behalf of the wife it is argued that she should pay nothing. It is not the function of this Committee to decide such a question. The fair sum is best assessed and awarded by the local courts. But having been taken through the figures by both counsel, their Lordships now understand what appeared so puzzling at the hearing of the petition for leave to appeal. Their Lordships are satisfied that on reflection the Court of Appeal adhered to the view that US\$350,000 was a fair figure to order the wife to pay despite the mathematical error in their approach. After all, it is recorded in the judgment of the Court of Appeal that the husband's counsel had submitted that if the waterfront property was awarded to the wife her

payment to the husband should be at the lowest US\$475,000. Against such a submission it would be, to say the least, very unusual to find a court awarding a higher figure, which would be the case if this mathematical route led to an award of US\$488,000.

Their Lordships feel constrained to say that if the reasons for a judgment are delayed until ten months after a hearing errors of recollection and reasoning may well creep in. It is one thing to keep firmly in mind the final figure agreed upon by the court, it is quite another to recollect the precise path of reasoning that led to that figure.

Their Lordships have not been persuaded by either counsel that it would be right to alter the figure of US\$350,000 either up or down. Looking at the overall disposition of the assets, it appears to their Lordships to be within the bracket to be expected and certainly not one with which it would be right to interfere either as founded upon a manifest error of law or as creating grave injustice.

There is one further matter to be mentioned. The wife has commenced proceedings to have the present leases of the waterfront property set aside, and the husband has a further claim for expenses which is vigorously contested by the wife. Both parties, through their counsel, expressed the wish that this protracted litigation should be brought to an end. Their Lordships have accepted the assurance of counsel that neither party will pursue these remedies, and have taken that into consideration in their adjudication upon this appeal.

For the foregoing reasons their Lordships will humbly advise Her Majesty that this appeal and cross-appeal should be dismissed. The principal issue in this appeal was the appellant's challenge to the disposition of the waterfront property; on this issue the appellant failed. The appellant must pay two-thirds of the respondent's costs before the Board.