IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
**Citation:** Johnson (Re), 2006 NSSC 384

**Date:** December 19, 2006
**Docket:** 22623
**Registry:** Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 22623
Estate No. 51-084662

In the Matter of the Bankruptcy of Verna Valerie Johnson

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D E C I S I O N

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**Registrar:** Richard W. Cregan, Q.C.

**Heard:** September 29, 2006

**Counsel:** Tim Hill for the Applicant, Verna Valerie Johnson

D. Bruce Clarke for the Trustee, WBLI Inc.

[1] In 1989 Verna Valerie Johnson and her husband Terry D. Johnson purchased a home at 21 Portland Estates Boulevard, Dartmouth. They were not yet married and were not cohabitating. Their marriage was in 1991. Title was placed in both their names jointly. Mrs. Johnson signed the mortgage which financed the purchase, but she did not contribute any money toward the purchase.

[2] She made some financial contributions toward the running of the home until September 1994 when she lost her employment. She made an assignment in bankruptcy in March 2000. Thereafter until after her discharge in 2001 she contributed little toward the cost of running the home.

[3] In an affidavit she deposed as follows:

> 5. At the time of the purchase of 21 Portland Estates Boulevard, Dartmouth, it was agreed between Terry D. Johnson and me that his contribution of $19,457.54 would be repayable to him on the subsequent sale of the property.
>
> 7. When I was considering making an assignment I met with Bill MacNeil who I understood was a trustee employed by White Burgess Langille Inman Incorporated ("WBLI"). We discussed the house at 21 Portland Estates Boulevard and at that time Mr. MacNeil told me that there would be "no problem" with the house and that the trustee would not be interested in realizing upon the house. My husband Terry D. Johnson had

made it clear to me that I should not do anything which would risk us losing our home. Relying upon Mr. MacNeil's advice I subsequently made an assignment in bankruptcy on March 24, 2000.

8. I was discharged from bankruptcy on June 27, 2001, and a copy of my Certificate of Discharge (Conditions Met) issued by WBLI and signed by Joe Wilkie is attached to this my Affidavit as Exhibit "A". I had several meetings with Joe Wilkie during the bankruptcy and at no time did he lead me, either verbally or in writing, to believe that there was any issue with respect to 21 Portland Estates Boulevard.

9. As a condition of discharge I paid to WBLI the sum of $3,600, as provided for in an agreement signed by me and attached to this my Affidavit as Exhibit "B".

10. At the time I discussed Exhibit "B" with Joe Wilkie he at no time told me that I might be required to pay more money to WBLI with respect to 21 Portland Estates Boulevard, or otherwise.

14. I was never advised and had no knowledge of the registration of any caveat against 21 Portland Estates Boulevard by WBLI.

15. Prior to the letter of Joe Wilkie dated March 29, 2006 addressed to me and attached to this my Affidavit and Exhibit "F", I had not been contacted by WBLI for almost 5 years, that is since receiving my Certificate of Discharge in early Summer, 2001.

[4] Mrs. Johnson's statement of affairs showed that she had a half interest in the home. For this purpose the home was valued at $122,400, which was its assessed value. At the date of bankruptcy the balance on the mortgage was $68,840. The assessed value for 2006 is $161,500.

[5] This matter first came before the court with the application of the Trustee for "an Order Permitting Registration of Trustee's Estate Interest in Real

Property after Discharge of Trustee" which was scheduled for April 21, 2006. The supporting affidavit of the Trustee contains this statement:

> ...the Trustee has not received any offer to purchase the bankrupt's equity in the property and is unable to dispose of its one-half interest.

[6] Mrs. Johnson through her counsel Mr. Hill filed a notice of objection to this application by way of a letter dated April 14, 2006. This resulted in an adjournment of the application.

[7] This was then followed by an application on the part of Mrs. Johnson for relief under section 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. c. B-3, "appealing the Trustee's refusal to disclaim the estate's interest in real property".

[8] What is before the court is the desire of the Trustee to seek its discharge but maintain its interest in Mrs. Johnson's half interest in the equity in the home and the assertion by Mrs. Johnson that the Trustee should completely disclaim its interest in the property. The foundation for Mrs. Johnson's application is section 37 of the *Act*. She in substance alleges that she is "aggrieved" by the Trustee's continued claim that it is entitled to one half of

the equity in the home, being the share which had belonged to Mrs. Johnson at the time of her bankruptcy, notwithstanding the representations regarding the home which have been made to her by representatives of the Trustee.

[9] As a point of objection Mr. Clarke noted that there was no evidence the Trustee was asked to disclaim interest in the property and refused. He argued that this was then not a properly constituted application before the court.

[10] The narrow question is how the equity should be distributed, to Mrs. Johnson, or to the Trustee, or allocated in part to each. This question is clearly evident to all. The format of the notices of application might be more clearly stated and Mrs. Johnson or Mr. Hill on her behalf might have sent a letter demanding the Trustee's disclaimer, but that would add nothing to the substance of the dispute before me.

[11] This observation answers Mr. Clarke's objection. I am fortified in this by the comment of de Grandpre J in the fourth last paragraph of *Mercure* v. *A. Marquette & Fils Inc.*, [1997] 1 S.C.R. 547:

> It (the *Act*) concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

[12] The evidence given by the Trustee in answer to that of Mrs. Johnson is contained in two affidavits, one of Joseph A. Wilkie of WBLI Incorporated, the Trustee, and William MacNeil. Mr. Wilkie has been the Trustee in charge of this matter. Mr. MacNeil, a trustee, is now retired, but at the time of Mrs. Johnson's assignment was working for WBLI Incorporated. He conducted the initial meetings with Mrs. Johnson.

[13] Of relevance in Mr. Wilkie's affidavit is the deposition that the inspector authorized him to write to Mrs. Johnson's husband offering to sell the estates half interest, which offer was refused; that he filed a Notice of the Bankruptcy in the Registry of Deeds; that the equity in the home was recorded in the Section 170 Report noting an unknown realization value; that he has a memo of a conversation with Mrs. Johnson on September 5, 2003 in which she asked for the notice of assignment to be removed so that the home could be refinanced, but he refused; and that to bring the matter to a head he commenced the application for the Trustee's discharge.

[14] As to the conversations mentioned in the above quoted portions of Mrs. Johnson's affidavit, both Mr. Wilkie and Mr. MacNeil's affidavits are silent except for comments prefixed by phrases such as "would have discussed" or "I would have advised". Neither of them says anything from their present recollection or from contemporaneous memoranda about the representations regarding the home Mrs. Johnson said they made.

[15] Mrs. Johnson, Mr. Wilkie, and Mr. MacNeil were not cross-examined on their affidavits. The only evidence before me is these affidavits. Mrs. Johnson's evidence is simply that she was told there would be "no problem" with the home. Mr. Wilkie referred to the mention of the home in the bankruptcy document and what he would have said. Mr. MacNeil referred to what his practice would have directed him to say. Neither gives evidence of what actually was said. Mrs. Johnson could have been cross-examined, but the Trustee elected not to take advantage of this right. Mr. Wilkie and Mr. MacNeil are professionals who know of the importance of documenting conversations with clients about critical matters such as family homes. This they did not do.

[16] This is all which is before me. In the circumstances I think it is for me to accept what Mrs. Johnson said in her affidavit and conclude that Mr. Wilkie and Mr. MacNeil had allowed her fairly to conclude that her half interest in the equity in the home, notwithstanding it was mentioned in some documentation, would not be taken by the Trustee.

[17] Having made this finding of fact, the legal consequences that follow must be determined.

[18] The usual practice in Nova Scotia is where a bankrupt continues to have possession of the home and arrangements have not been made whereby the bankrupt can obtain the release of the trustee's interest, or have been made and the bankrupt has neglected to comply with them, the trustee will after the passage of a reasonable time apply to the court to obtain its discharge and for permission to maintain a caveat on the property. If the bankrupt does not appear or appears but does not object, the application is normally granted. The caveat stays in place until the bankrupt's circumstances (such as the need to refinance) change and the matter is brought to a head with the terms of the lifting of the caveat either settled by agreement or by the court.

In substance this is what is before the court in this application.

[19] The following gives the court power to review the trustee's action or lack of action respecting the home and determine the appropriate resolution:

> 37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[20] *Marino, Re* (2003), 48 C.B.R. (4th) 114 (Ont. Hockin J.), and the confirmation of this decision on appeal, *Marino, Re* (2004), 2 C.B.R. (5th) 290 (Ont., C.A.), deals with a similar situation.

[21] The bankrupts, husband and wife, at their assignment owned a home in which there was equity of $75,000 to $100,000. The trustee took no action to realize on it. The bankrupts continued to live in it, pay the mortgage and make improvements. They were discharged nine months after their assignments. They had been told by a representative of the trustee before they were discharged that the trustee would not be selling their home. This representation was repeated after their discharge. Apparently, the trustee

had not filed a caveat or anything else on the registry to indicate having an interest in the home. However, eighteen months after their discharge, the trustee caused the registration to show it as owner of the home. The next contact was four years after their discharge, the trustee telling the bankrupts that there were "some issues on the file" as the home was registered in the trustee's name.

[22] I quote from Hockin J's decision, paragraph 15 beginning at page 117

> There was never a time from the date of their assignments until certificates of discharge were delivered that the trustee did not know of the property, the existence of any equity in the property and its approximate value. The time to negotiate or realize on the property was during the bankruptcies of the respondents. Absent agreement or a realization of the asset, the trustee could have opposed the discharge under section 178.1(1)(d) and in that way the issue could have been joined and dealt with by the granting of a conditional discharge or by settlement or the granting of an absolute discharge. It was not and Mr. and Mrs. Marino it seems to me were entitled to get on with their lives. It would be unfair now to subject them to what should have been done over four years ago.

[23] Hockin then makes reference to the observation in *Zemlak (Trustee of)* v. *Zemlak* (1987), 42 D.L.R. (4th) 395 (Sask. C.A.), 66 C.B.R. (NS) 1, the point of which is that it is contrary to the purpose of the *Act* for the post discharge earnings and acquisitions of a bankrupt which could be used freely by the bankrupt, to indirectly become available to the creditors by the back

door, to use a metaphor, if they are put into the family home.

[24] The Court of Appeal decision began with the analysis of a number of technical issues and concludes by finding that the trustee is estoppel from realizing on the home. I quote the following paragraphs:

> 32 To rely on promissory estoppel Mr. Marino must establish:
> (a) Deloitte & Touche, by words or conduct, made a promise or assurance which was intended to affect its legal relationship with Mr. Marino and intended Mr. Marino to act upon it; and
>
> (b) Mr. Marino, relying on the representation, acted on it or in some way changed his position.
>
> 34 In this case, the motions judge found that the trustee had, through its representatives, until at least 2000, given assurances to the Marinos that it would make no claim against the equity in the property. The trustee did not tell them of its 1999 registration on title. Even though the trustee did raise the possibility in 2000 of requiring further information about the property's equity, it took no further action until 2002.
>
> 35 Not only did the trustee give assurances to the Marinos, but the Marinos also did not engage in any conduct that would have misled the trustee. The trial judge found as a fact that the Marinos acted honestly.
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> 36 After the Marinos, and specifically Mr. Marino, received the trustee's 1997 assurance that the trustee would not proceed against the property, the Marinos acted upon that assurance. They continued to reside in the home, satisfied the outstanding mortgage arrears on the property and proceeded with upgrades to the property. But for the trustee's assurance, the Marinos could have earlier begun the

> "fresh start" contemplated by the Act, abandoned the premises to the trustee, and begun the process of building an equity in another property.
>
> 38 Accordingly, the representations and conduct of the trustee and the Marino's actions in reliance on them, estops the trustee from now realizing upon its registered interest in the property.

[25] I think it is on this ground that I can dispose of this application.

[26] As stated in paragraph [16] I accept Mrs. Johnson's evidence as stated in her affidavit.

[27] Mrs. Johnson was told in 2000 that the home was not at risk. With the assurance she proceeded to address her financial problem with an assignment. Subsequent to her assignment, nothing was ever said to her by representatives of the trustee that it would ever assert a claim against the home until the letter of March 29, 2006 giving notice of this application. The only evidence contrary to this is Mr. Wilkie's comments about the 2003 telephone conversation re releasing the caveat to allow refinancing and the letter to Mr. Johnson, but that was not to Mrs. Johnson. She quite reasonably assumed that on paying $3600, the condition of her discharge,

that would be the end of it. She and Mr. Johnson continued to live these years in the home, paid the mortgage, paid the taxes, spent money to maintain it, built up equity all assuming it was their home. If Mrs. Johnson had not these assurances expressed and implied, she would have considered other solutions to her problems.

[28] These representations, and conduct of the trustee were intended to affect legal relations with Mrs. Johnson and intended that she act upon them.

[29] She relied on them and did not take alternative proceedings having confidence that the home was secure.

[30] The representation and conduct of the Trustee and her reliance on them, estops the Trustee from continuing to assert an interest in the home.

[31] It was suggested that Mrs. Johnson is using estoppel as a sword and not as a shield. That is, she is using it as a cause of action against the Trustee in seeking an order that the Trustee disclaim interest. That is a technical argument. As mentioned before, the substance of what is before me is that

the Trustee is asserting an interest in the home and asking that it be preserved after the Trustee's discharge. Mrs. Johnson is responding by denying the Trustee's interest. In substance the action is by the Trustee.

[32] The Trustee shall be at liberty to proceed to discharge, but is denied the right to continue its caveat or claim against the home and will be required to execute such documents or releases as may be necessary to carry this out.

[33] If costs are sought, I shall hear the parties.

R.

Halifax, Nova Scotia
December 19, 2006