



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2008: No. 308

**BETWEEN:**

**Kim Bird**

*Petitioner*

**-v-**

**Francyna Bennette et al**

*Respondents*

## EX TEMPORE RULING ON COSTS

(In Court)

Date of Hearing: July 25, 2011

Date of Ruling: July 25, 2011

Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Petitioner

Mrs. Lauren Sadler-Best, Trott & Duncan, for the Respondents

## **Introductory**

1. In this matter the Petitioner, by Summons dated 16<sup>th</sup> June, 2011, seeks an Order of Costs against the 5<sup>th</sup> Respondent on the grounds that costs should follow the event and alternatively on the grounds that the 5<sup>th</sup> Respondent has conducted the proceedings unreasonably (or has acted unreasonably in the conduct of the present partition action).

## **Findings: principles applicable to costs in partition actions**

2. I have regard to my experience of partition actions generally and also to the case of *Re Vickers, Jones, Jones –v- Lambert*, Civ 1999/24, a decision dated 22<sup>nd</sup> October, 1999 of Acting Puisne Judge Michael Mello to which Mrs. Sadler–Best referred. I find that the usual rule that costs follow the event does not apply inflexibly to this type of action.

## **Findings: the apportionment of costs**

3. On the other hand the Court cannot ignore the distinctive features of the present case, which I will summarize briefly as follows.
4. Firstly, it seems clear that the Petition had to be filed not because all of the co-owners were in dispute, but because the 5<sup>th</sup> Respondent having at some point agreed to the sale of the property with her co-tenants and subsequently changed her mind. I therefore find that the Petitioner should be entitled to the costs of the Petition and the related costs up to and including the 28th August, 2009 when the initial Sale Order was obtained. I also find on the basis of the fact that this specific application was opposed, that the Petitioner should be awarded the costs of obtaining the 15 October 2009 Order.
5. As regards the remaining costs of the Petition, the position in my judgment is far from clear. I accept entirely that it appears to the Petitioner that some if not all of the offers that were received in a falling market were lost because the 5<sup>th</sup> Respondent was not responsive in a timely manner. However I am not satisfied on the evidence presently before the Court that any of the lost offers can fairly be laid at her door. In fact when one really looks at the evidence and takes note of the way in which the costs application was put, the real grievance that the Petitioner has relates not to the 5<sup>th</sup> Respondent's conduct during the litigation but her conduct before it.
6. It does seem to me to be more likely than not, on the evidence before me, that the 5<sup>th</sup> Respondent's delay and obstruction before these proceedings were commenced did contribute to the property only being actively sold after the market had fallen. But

this in my view is not a grievance that can be remedied by way of a costs order, having regard to the fact that the conduct in question took place before the commencement of the present proceedings.

7. I believe that only leaves outstanding the question of the costs of the present application which has been heard on a contested basis today. I think I probably should hear counsel before dealing with this last element of the costs. But I would indicate that my provisional view is that looking at it very broadly the Petitioner has probably succeeded in the region of 50%. And while she should have some costs of the present application it seems to me, subject to hearing counsel, that she should not recover more than 50% of the costs of the present costs application.

### **Conclusion**

8. [After hearing counsel, the Petitioner was granted 50% of her costs in relation to the present application for costs].

Dated this 25<sup>th</sup> day of July, 2011

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KAWALEY J