In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: 112

IN THE MATTER OF THE PARTITION ACT 1855 AND THE PARTITION ACT 1914

AND IN THE MATTER OF AN APPLICATION BY WALLACE ASHLEY WELLMAN

BETWEEN:

WALLACE ASHLEY WELLMAN

Petitioner

-v-

DEBRA MARIE WELLMAN

1st Respondent

-and-

BARRY S. WELLMAN

2nd Respondent

-and-

DENA D. WELLMAN

3rd Respondent

JUDGMENT

(in Court)

Date of hearing: November 21, 2011, December 12, 2012
Date of Judgment: January 14, 2013

Mrs Lauren Sadler-Best, Trott & Duncan, for the Petitioner

The 1st Respondent appeared in person[1]

The 2nd and 3rd Respondent did not appear

Introductory

1. On April 1, 2010, the Petitioner filed the Petition herein seeking an Order for the sale of 11 Mount Olive, Cooks Hill Road, Somerset MA05 ("the Property"), which is jointly owned by the parties to the present action.

2. In a partition action, the only dispute which it is open to the Court to adjudicate upon is a dispute in respect of the ownership or financial interests in the property to which the action relates. Such a dispute arose in the present case. It centred on the credit to be given to the 1st Respondent in respect of renovations it was ultimately agreed she had financed to construct the apartment in which she now resides.

3. The Petitioner conceded that the 1st Respondent should be given credit for the principal amount of the mortgage taken out in 2004 which she solely serviced . He disputed her entitlement to have interest payments taken into account. The 1st Respondent in her First Affidavit made the somewhat unusual claim not only for her mortgage payments to be taken into account but also for the entire increase in equity between a November 2003 valuation (pre-construction) until December 2011 (post-construction) to be attributed to her.

4. Subsidiary issues which were raised included the extent to which the Petitioner and 1st Respondent had made contributions to land tax and home insurance which the other siblings had not.

5. The Petitioner and the 1st Respondent both gave oral evidence. At the end of the November 21, 2011 hearing the matter was adjourned so that the 1st Respondent could give proper discovery of the documents relevant to her expanded case that she spent $125,000 on top of the mortgage. I expressed the provisional view that the costs of that hearing should be awarded to the Petitioner in any event because her failure to make proper discovery (despite filing a List of Documents) prevented the hearing from being concluded on that date.

6. A Supplemental List of Documents was filed by the 1st Respondent on December 9, 2011. Agreed dates for a resumed hearing were not submitted by the Petitioner's

[1] Braxton & Co appeared for the 1st and 2nd Respondent at the November 21, 2012 hearing. The 1st Respondent filed a Notice of Intention to Appear in Person on July 13, 2012. The 2nd Respondent did not appear at the resumed hearing on December 12, 2012.

counsel until May 23, 2012. Although the matter was listed to continue on July 16-17, 2012, I was unexpectedly unavailable on these dates and the matter was further adjourned to December when the hearing concluded in less than half a day.

7. By the end of the hearing it was clear that the issues in dispute were fairly narrow and could ideally have been resolved by agreement without formal determination by the Court. However, in fairness to the parties, it is never easy to achieve an outcome which meets the emotional and financial needs of several siblings who inherit a single property.

Findings: the 1st Respondent's contributions to the Property

8. It was not disputed that the 1st Respondent has contributed solely to the mortgage of some $238,000 which has not yet been paid. The Petitioner conceded that the 1st Respondent should receive credit for this full amount, even though approximately $130,000 is still repayable over the next 5 years.

9. The strict legal position is that each of the four joint owners is equally liable for the mortgage costs, as regards principal and interest. It appears from a February 15, 2008 Loan Statement produced by the 1st Respondent that the monthly repayments were at that juncture roughly $2000 per month of which roughly $1100 was interest. From annotations made on a February 15, 2004 to March 2, 2004 bank statement produced by the 1st Respondent, it appears that she calculated her mortgage servicing payments (interest and principal) between February 2004 and mid-November 2011 at $166, 899.16. She has probably paid approximately $24,000 since then making her total expenditure to date approximately $190,000.

10. In fact she should have paid only 25% of that sum or roughly $47,500. So she has overpaid approximately $142,500. The Petitioner's concession that his sister should be credited with $218,000 seems somewhat generous (analysed as compensation for her mortgage expenses alone) and would only be an underestimate of her mortgage costs if she continued to meet these obligations for more than 3 years. However, the 1st Respondent also says she funded various expenses out of pocket, expenses she cannot now fully document. I accept some out of pocket expenses were incurred by her. Her estimate was $150,000; if this is correct she overpaid $112,500.

11. Accordingly, if the 1st Respondent's claim were to be taken at its highest, she would have been entitled to be given credit for overpayments of $142,500 (mortgage) and an estimated $112,500 (out of pocket expenses) or $255,000 altogether. Taking into account these undocumented out of pocket expenses which the 1st Respondent is unable to prove in any credible specified amount, I find that the Petitioner's concession that she ought to be given credit for $218,000 is not only the best available but also a reasonable basis for assessing the extent to which the 1st Respondent should be compensated for up to and including the date of judgment for:

(a) having paid an extra 75% of the quantifiable mortgage expenses; and

(b) having paid an extra 75% of the undocumented out of pocket expenses.

12. However, the 1st Respondent should in addition be given credit for any further overpayments which she may make hereafter. This entitlement is subject to the proviso that she does not in the interim unreasonably delay the sale or other disposal of the existing ownership interests in the Property.

13. In these circumstances I make no findings on any further sums the Petitioner or the 1st Respondent sought to argue were due based on one or two individual invoices the evidential reliability of which were somewhat unclear.

14. I was not invited to take into account the benefit of living on the property which the 1st Respondent or any other party received and do not propose to do so. However, in summarily dismissing the 1st Respondent's claim for credit to be given for the way in which her mortgage contributions enhanced the equity in the Property, it is appropriate to note the following two points:

(1) the 1st Respondent's contributions to the mortgage are being taken into account based on the mortgage payments she made over and above her 25% proportional obligation. Any further compensation would amount to a double recovery for the same loss; and

(2) the Petitioner has not sought to play "hardball" and insist that those of his siblings (including the 1st Respondent) who have occupied the Property since he himself left in or about 2008 ought to reimburse him for the additional benefit they received of rent-free accommodation.

Land tax and home insurance

15. The respective contributions to land tax and home insurance were not addressed in the parties' Affidavits. The Petitioner in his evidence-in-chief (in November 2011) admitted that he had paid no land tax but claimed that he has contributed to home insurance since 2008. Mrs Sadler-Best in closing suggested her client had paid $361.20 towards land tax in 2008-2009. The 1st Respondent's own documents, produced after both parties gave evidence in November 2011, contain admissions that the Petitioner paid $185.56 up to September 2008 and $175.64 up to October 31, 2010, a total of $361.20. Counsel conceded that in respect of the two valuation units,

the 1st Respondent had solely paid $2203.94 since September 2009 which her three siblings were liable to contribute.

16. In her oral evidence in November 2011, the 1st Respondent testified that land tax was $349 billed two or three times a year. The documents subsequently produced suggest that ARV 32400. The documentary record is unclear in terms of how much the 1st Respondent contributed and how much the 1st Petitioner claims she paid.

17. These sorts of details are usually the subject of agreement. This is because the legal costs involved in nit-picking analysis in relation to comparatively modest sums will usually be disproportionate to the sums in dispute. If litigants wish the Court to decide such controversies, clear evidence should be placed before the Court. Without making any final determination on the global accounting to be carried out between all four siblings on land tax (if any), I find based on admissions that:

    (a) the Petitioner has paid $361.10;

    (b) the 1st Respondent has paid $2203.94.

18. Based on Mrs Sadler-Best's closing submissions to which the 1st Respondent did not dissent, it appears to be common ground that on the home insurance front, between 2009 and 2010, the Petitioner and 1st Respondent each paid $2399.74 out of $4799.48. I find that they should each be credited as against the 2nd and 3rd Respondent the sum of $1199.87 because each sibling ought to have paid $1199.87.

19. The Petitioner also conceded that the 1st Respondent solely paid $3238.26 in 2011 in respect of home insurance. She accordingly is due credit from her three siblings for the $2428.70 she paid in excess of her 25% share of $809.56.

Conclusion

20. The Petitioner is entitled to an Order for sale of the Property by private treaty. However, before a final Order is made, there clearly needs to be an updated valuation upon which the sale conditions can be based. I will hear the parties on the identity of the valuation expert to carry out this task but it seems logical for the company which did the initial valuation for the 1st Respondent to update the December 21, 2010 Report.

21. I anticipate that the 1st Respondent, in particular, will give consideration to whether she and/or her children can afford to buy out one or more of her siblings' interests in light of the present Judgment and any updated Report. Having regard to how long the present proceedings have been on foot and the time the parties have

already had to investigate such acquisition options, the Court is unlikely to postpone making an Order for sale for very long.

22. In summary, the Petitioner and the 2nd and 3rd Respondents are liable to compensate the 1st Respondent in the amount of $218, 499.86 ($72,833.28 each) in respect of their share of the monies expended by her on developing the Property by way of mortgage payments and other out of pocket expenditure. In respect of home insurance, she is entitled to credit for overpayments of $2428.70 ($809.56 from each of her siblings). This deals with the position up to the date of Judgment-a final accounting must done as at the date of the sale. I make no final determinations on the land tax position for the reasons set out in paragraph 17 above.

23. I will hear the parties if necessary on the terms of the Order to be drawn up to give effect to this Judgment and as to costs. Family property matters are often highly emotional and difficult to resolve in an amicable manner. The Petitioner made a commendable concession on the value of his elder sister's contribution to the Property's value. It is to be hoped that the parties will move forward in a cooperative manner with a view to bringing this matter to a speedy conclusion.

Dated this 14th day of January, 2013 _____

IAN RC KAWALEY CJ