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

RULING

(in Chambers)

Date of hearing: July 25, 2013
Date of Ruling: July 26, 2013

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

Mr. Valdon L. Caesar, Caesar's Law Chambers, for the 1st Respondent

The 2nd and 3rd Respondent did not appear

1. The Petitioner applied by Summons dated June 20, 2013 for clarification of paragraph 22 of the Court's Judgment herein dated January 14, 2013. In light of the terms of paragraph 4 of the January 14, 2013 Order giving effect to the Judgment, no ambiguity properly arose.

2. The proper basis for calculating the value of the parties' interests in the Property unexpectedly became the centrepiece of the hearing and I decided to reserve judgment and give directions on what I considered must be the correct valuation approach after due deliberation. Litigants do not ordinarily argue over such obvious matters of commercial practice.

3. This pause fortuitously enabled me to properly assess a belatedly raised collateral complaint about the same paragraphs of the Judgment and Order and the proportions in which the mortgage expenses were directed to be shared.

The correct proportions for contributions to mortgage expenses

4. Somewhat curiously, bearing in mind that the Judgment was handed down over six months ago, the Petitioner's counsel queried for the first time why the mortgage contribution referred to in paragraph 22 for each of the three joint tenants was one-third rather than one quarter. The Judgment was sent out in draft before Christmas, over two weeks before it was handed down. No complaint was made about paragraph 22 at the January 14, 2013 hearing. On March 28, 2013, the 1st Respondent's counsel submitted the final Order under cover of letter complaining that the Petitioner's counsel had declined for two months to provide input on the terms of the Order. When the matter was raised orally in Court somewhat indirectly yesterday, it was impossible for me to attach any weight to it.

5. On the other hand I was troubled by the genuine sense of grievance manifested by the Petitioner's counsel. No doubt my incomprehension as to why this point was not raised earlier was matched in equal measure by Mrs. Sadler-Best's incredulity at the notion that I had miscalculated the proportional contributions to be paid by each of four joint tenants (as opposed to deliberately departing from the expected apportionment for reasons which were unclear). I carefully reviewed the relevant portions of the Judgment and reassessed the Petitioner's belated complaint.

6. I find that paragraph 22 contains an obvious and elementary arithmetical error which ought to have been queried on or before the hearing in January when Judgment was handed down. The contribution to be paid to the mortgage expenses paid by the other three of four joint tenants ought to have been ¼ rather than 1/3rd. Paragraph 4 of the Order dated January 14, 2013 should surely be amended or varied to reflect the contribution of the three co-owners based on a ¼ share each of the mortgage

payments up to the date of the sale. To err may be human and to forgive divine; but clear errors which work an injustice must, wherever possible, be corrected. This error may, subject to hearing counsel if required, be corrected under the slip rule. Order 20 rule 11 provides:

> "*Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Registrar.*"

7. Clearly this power can be exercised by a judge as well. The Judicial Committee of the Privy Council considered the slip rule in a case where the trial judge omitted to deal with interest at all and counsel only applied to correct the slip nine months later: *Tak Ming Company Limited-v- Yee Sang Metal Supplies Company* [1972] UKPC 23. The Judicial Committee held that there was an accidental omission by the judge to award interest and an accidental omission by counsel to ask for it and, as such, the omission fell within the slip rule (at page 4). As far as the general discretion to correct an error and the impact of prejudicial delay as a potential grounds for refusing to grant relief under the rule, Lord Pearson concluded (at page 6):

> "*In this case there was considerable delay by the respondents before they made their application under the Slip Rule. It does not appear, however, that the delay caused the appellants to take any step which they would otherwise have refrained from taking or to omit any step which they would otherwise have taken.*"

8. These observations would appear to apply to the slip under present consideration. As this point has been only partially raised by counsel in the face of the Court and only explicitly been identified by the Court after reserving judgment, I would direct that the Petitioner's counsel should be entitled to be heard (if necessary) before the correction to the January 14, 2013 Order (which I have strongly but provisionally suggested should be made) is entered in an amended Order[1].

The correct valuation approach: net value versus gross value

9. I undertook to consider whether, as Mr. Caesar asserted, the recognised basis for calculating the value of interest in property is to use the net equity in the property as opposed to its gross value. Very shortly, it is indeed clear that the net value of property is used for valuation purposes, whether in the context of partition or divorce petitions. In *Rampersad-v-Edwards and Simmons* [2008] Bda LR 76, a partition action, Wade-Miller J concluded (at paragraph 26):

> "*The parties have agreed that the property should be dealt with on the basis of Coldwell Banker, Bermuda Realty valuation of $825,000. The outstanding mortgage liability at the time of trial was $52,321.*"

10. In *Astwood-v-Astwood* [2012] Bda LR 70, Sir Austin Ward JA summarised the background to an ancillary relief application as follows:

[1] However, see footnote 2 below.

"*15. The Petitioner applies for a lump sum of $493,220, described as being one-half of the assets available for distribution. It is a claim for fifty per cent of the equity in the matrimonial home using its highest estimated value and the value of the boat…*"

11. On reflection it is obvious that any sensible valuation of an interest in property must be based on the net equity rather than the gross value of the asset in question. The same principle which applies on a sale to third parties must apply to a sale by three joint tenants to the fourth. The proposal made by the 1st Respondent in this respect as set out in her attorney's letter of April 13, 2013 was entirely reasonable, subject to the need for the contribution to be paid by the selling parties to be reduced from the one-third figure mistakenly referred to in paragraph 4 of the Order and paragraph 22 of the Judgment dated January 14, 2013.

Conclusion

12. The Court determined the parties' liabilities in respect of mortgage obligations and related expenses in connection with the Property, and postponed making the sale Order sought by the Petitioner to afford the First Respondent the opportunity to negotiate to buy out the ownership shares of the other joint tenants. The impasse which brought the parties before the Court was the Petitioner's refusal to accept that the value of the property for sale purposes should be calculated on the basis of the net equity in the property as opposed to its gross value ignoring the outstanding mortgage debt. This refusal, it now seems obvious, was likely in part inflamed by the Petitioner's legitimate grievance that the Court had unfairly calculated his share of the incurred mortgage costs[2]. This sense of grievance was no doubt sharpened by the fact the Court gave him credit for making a generous concession as to the quantum of those expenses.

13. It is to be hoped that directions set out in the present Ruling will enable the parties to conclude an agreement for the acquisition by the 1st Respondent of her siblings' shares in the Property.

Dated this 26th day of July, 2013 ___________________________

IAN R.C. KAWALEY CJ

[2] After hearing counsel in Chambers on August 12, 2013 and carefully reviewing the original Judgment ([2013] SC (Bda) 2 Civ (January 14, 2013)) together with the Court record, it was determined that the original apportionment of the mortgage costs to be paid by the Petitioner was correctly calculated for the reasons set out in paragraph 11 of the said Judgment.