In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 12

IN THE MATTER OF THE PARTITION ACTS

BETWEEN:-

HAZEL MARLENE HOLDER

Petitioner

-and-

(1) ANTOINE JAMES LUDDELL HOLDER
(2) CLYDE ELLIOTT BRAXTONE HOLDER

Respondents

JUDGMENT

(In Court)

Date of hearing: 8th March 2014
Date of judgment: 18th March 2014

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

Mr Christopher E Swan, Christopher E Swan & Co, for the First Respondent

The Second Respondent in person

Factual background

1. This is a partition action in connection with the property known as 7 Pembroke Park Lane, Pembroke, Bermuda HM 07 ("the Property").

2. By a conveyance dated 9th June 1988 legal title to the Property was conveyed to the Petitioner and her son, the Second Respondent, for a price of $200,000.

3. The conveyance was made pursuant to an oral agreement ("the Agreement") between the Petitioner on the one part and her brother, Henry Holder ("Mr Holder"), acting for his son, the First Respondent, on the other. Under the agreement the Petitioner would buy the property on behalf of herself and the First Respondent. The Petitioner would pay half the purchase price and Mr Holder or the First Respondent would pay the other half. The addition of the Second Respondent to the title deeds does not appear to have been discussed. The Petitioner said in evidence that the Property was conveyed into their joint names because it seemed the right thing to do. The Second Respondent does not claim any beneficial interest in the Property but supports his mother's position.

4. The Property was purchased by way of a mortgage that the Petitioner took out with Bank of Bermuda. I accept her evidence that because she was employed by the Bank she obtained the mortgage at a discounted rate. The Property was not conveyed jointly to her and the First Respondent because, had the Bank known the true situation, it would only have lent money at a discounted rate in relation to her interest in the Property. The First Respondent contributed half the mortgage repayments until the mortgage was redeemed.

5. I therefore reject the First Respondent's affidavit evidence that he provided the Petitioner with a payment of $100,000 up front before she purchased the Property. Had he done so there would have been no reason for the Petitioner to take out a mortgage for $200,000 rather than $100,000; or for the First Respondent to pay the money to the Petitioner rather than directly to the

Bank; or for the Property not to have been conveyed into the joint names of the Petitioner and the First Respondent. Had the First Respondent wanted his name to appear on the title deeds to the Property at the time, I am satisfied that he would have ensured that it did.

6. The Property is a single lot of land which consists of a rectangular strip lying on the slope of a hill. The narrow sides of the rectangle lie along the top and the bottom part of the hill respectively and the longer sides of the rectangle run in parallel from the bottom part of the hill towards the top. It is helpful to imagine the Property as falling into upper, middle and lower areas.

7. There is, and was at the date of the conveyance, a cottage on the lower area of the Property. The Petitioner renovated the cottage, which, following the purchase, has for many years been her home. There is no vehicle access to the lower area of the Property, which can only be reached from Pembroke Park Lane, which runs along the bottom, by climbing a steep flight of some 30 concrete steps. There is no space to park a car at the bottom of the steps. The upper boundary to the lower area is sheer limestone cliff which is maybe three or four feet tall at its lowest point and eight to ten feet tall at its highest point.

8. The middle area of the Property is a wooded slope. At the date of the purchase the slope was quite gentle but is now much steeper. This is because of overspill from excavation works on the upper part of the Property which now covers much of the slope. The works were carried out by the First Respondent. I shall deal with them further below. The slope is covered in fair sized trees and vegetation, which is quite dense in places. It is not presently accessible from either the upper or the lower area of the Property, although it can be accessed from neighbouring property which runs up the side of the hill. If, as the parties intended, the Property were to be divided into two lots, the boundary would bisect the Property somewhere in this middle area.

9. The First Respondent has levelled off the upper area of the Property, on which he has built a two storey property consisting of a two bedroom house and a two bedroom apartment ("the house"). The house is substantially larger than the Petitioner's cottage. There is a horizontal lawn at the back of the house. Below the lawn lies the middle area of the Property. At the date of the conveyance, the only lawful way to access the upper area of the Property was through the lower and middle areas as there was a narrow tract of land between the upper area of the Property and Eve's Hill Lane – the road which runs along the top of the hill – over which there was no right of way. Happily, the question of access has now been resolved.

10. Under the Agreement, the First Respondent was to arrange for an application to subdivide the Property so that the upper half formed one lot and the lower half the other. Once the subdivision had been approved, the Petitioner would convey the upper lot to the First Respondent. However the parties disagree as to where the boundary between the subdivided lots was supposed to lie.

11. The Petitioner stated in evidence that it was an express term of the Agreement that the Property was to be divided into two lots of equal size. The First Respondent disagreed. He stated in evidence that his father told him that the Property was to be divided as shown in a plan drawn up by Jones Waddington Ltd ("Jones Waddington") in November 1988 on prior plans culled, or so his father said, from the Petitioner's deeds. The plan shows an upper lot marked A and a lower lot marked B. Lot A is noticeably larger than Lot B: Lot A covers 0.061 hectares and Lot B covers 0.0465 hectares. The First Respondent stated that this is the subdivision to which he agreed. For ease of reference I shall henceforth refer to the Property as comprising Lot A and Lot B even though there has as yet been no subdivision.

12. The reason for the discrepancy in size appears to be this. The November 1988 plan shows alternative locations for the upper boundary of Lot A. One location is marked "*Boundary according to deeds*". This is the boundary

which appears on the 9th June 1988 conveyance. If this boundary line were applied, Lots A and B would be of equal size. The other location is marked "*Boundary according Godet [to] plan PE 64P[] dated Aug 16 1977 [and] HB Crisson plan F1 1[] dated March 21 197[]*" ("the Godet boundary"). If this boundary line were applied, Lot B would remain the same size but Lot A would be larger, so that Lot B would be only 75% of the size of Lot A.

13. The November 1988 plan shows the Godet boundary as the correct boundary. That is how the First Respondent has treated it. No rival claimant has ever emerged to dispute that the land within the Godet boundary now forms part of the Property. From this I conclude that the boundary of the Property was most likely marked correctly on the November 1988 plan. If it was not, the boundary to the Property has since expanded to coincide with the Godet boundary by reason of adverse possession.

14. In so finding, I have in mind that, pursuant to section 16 of the Limitation Act 1984, the 20 year limitation period for a third party to bring an action to recover the land between the boundary shown in the deeds and the Godet boundary has expired some years ago.

15. The November 1988 plan was not drawn up until five months after the Property was conveyed to the Petitioner. Therefore it cannot have informed the First Respondent's decision to enter into the Agreement or contribute to the purchase price of the Property. There were no previous plans of the Property showing its subdivision.

16. A letter from Jones Waddington to the Department of Planning, which was received by the Department on 21st September 2001, states that the plan was drawn up on the instructions of the First Respondent. I accept that it was, and infer that it was prepared pursuant to an application to subdivide the Property.

17. Even when confronted with the letter, the First Respondent insisted that the plan had been drawn up on the instructions of the Petitioner. I reject his evidence on the point. It is indicative of how his evidence tended to

conform to what he wanted the facts to be rather than what they actually were. On the other hand I found the Petitioner to be a careful and reliable witness. Where their evidence conflicts I prefer her evidence. Although I bear in mind that the recollection of neither witness was as fresh at trial as it was in the immediate aftermath of the events in this case, many of which happened some years ago.

18. An application accompanied by the plan was submitted by the surveyors Gauntlett and Jones Ltd in November 1988. The applicant was named as the Petitioner and she signed the application. No doubt this was because she was one of the legal owners of the Property. Thus the First Respondent stated in evidence that he could not submit the plans without the signature and prior consent of the Petitioner since his name was not on the deeds to the Property. But I am satisfied that the First Respondent was the driving force behind the application.

19. The application was refused by the Development Applications Board ("the Board") on 13th September 1989. The reasons for refusal were (i) that the proposed sub-division did not comply with the provisions for minimum lot size under the Bermuda Plan and (ii) Lot A would be landlocked as there was no right of access over the parcel of land between Lot A and Eve's Hill Lane. It does not appear that the Petitioner was ever notified of the outcome of this application.

20. The Petitioner gave evidence, corroborated by the Second Respondent, that from time to time she would ask Mr Holder what was happening with the subdivision. She stated that Mr Holder said that the First Respondent was doing what was necessary and that he showed her the November 1988 plan. She noticed that Lot A looked larger than Lot B and asked Mr Holder about this. She said that he replied:

> ... according to Antoine [ie the First Respondent], the original map was wrong because certain footage of land at the top belonged to BELCO and had wires buried underground.

21. This explanation, if recollected accurately, does not make much sense: if the land at the top belonged to BELCO then the original map, which I take to be the plan annexed to the June 1988 deed of conveyance, was wrong in that it showed that the land at the top belonged to someone other than BELCO. But the November 1988 plan would have been even more wrong in that it showed that the land at the top belonged to Lot A. What the Petitioner appears to have understood from this explanation is that, however the boundary of Lot A and Lot B was drawn, both Lots would be of equal size.

22. On 15th March 2001, ie more than 11 years later, the parties signed a voluntary conveyance purporting to convey Lot A to the First Respondent. Their signatures were witnessed by the late Michael Telemaque, the attorney who drew up the conveyance. I accept the Petitioner's evidence that Mr Telemaque was instructed by the First Respondent and reject the First Respondent's evidence that he was instructed jointly by the First Respondent and the Petitioner. In this regard I note that the First Respondent accepted in his witness statement that he paid Mr Telemaque's fees for drawing up the conveyance.

23. The Petitioner and the Second Respondent stated that they didn't read the conveyance before signing it – and that Mr Telemaque did not explain it to them or suggest that they obtain independent legal advice – but that they knew what the conveyance was for.

24. The schedule to the conveyance states that the November 1988 plan is annexed thereto. The Petitioner confirmed when giving oral evidence that a copy of the plan was annexed to the conveyance when she signed it. I am satisfied that it was annexed, notwithstanding that the Second Respondent stated that he did not recall seeing it when he signed the conveyance.

25. The Petitioner said that she had signed the conveyance because Mr Holder had told her that the First Respondent had obtained the subdivision of the Property. She stated that she believed him, and was confident that the First Respondent had secured a fair and proper subdivision of the Property.

26. The First Respondent gave evidence that the impetus behind the voluntary conveyance was his realization at about that time that his name was not on the title deeds to the Property. I am satisfied that he had known all along that his name was not on the title deeds. However I note that on 1st November 2000 he had received building permission to construct a house on the land shown as Lot A on the November 1988 plan, and accept that this concentrated his mind on the need to regularise his position as to ownership.

27. The deed of conveyance was void as planning permission had not been obtained for the subdivision of the Property. Section 35B of the Development and Planning Act 1974 ("the 1974 Act") provides that, except in certain situations that do not apply here:

> (1) planning permission is required for any subdivision of land.
>
> . . . . .
>
> (3) Subdivision in contravention of subsection (1) shall not create or convey any interest in land; but this subsection shall not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if planning permission is obtained.

There was no such express condition in the voluntary conveyance.

28. On 16th May 2001 the First Respondent submitted a further application for a subdivision in substantially the same terms as the previous application. It was refused by the Board for the same reasons as the previous application was refused.

29. Meanwhile the First Respondent was engaged in a long running battle with the Department of Planning over the construction of his house on the Property. Planning permission was revoked but eventually, on 30th December 2004, the Department issued certificates of use and occupancy. Meanwhile, the First Respondent had obtained mortgages to the value of $1.5 million ostensibly secured against Lot A. It is doubtful whether the Bank would have loaned him the money if it had appreciated that the

Property had not been subdivided and that his name did not appear on the title deeds. The First Respondent gave evidence that all but around $200,000 of the mortgages has now been repaid.

30. On 9th August 2005 the First Respondent obtained at a cost of $30,000 the grant of a 10 foot right of way over the strip of land between Eve's Hill Lane and the boundary of the Property. This removed one of the objections to the subdivision.

31. By a letter dated 23rd November 2007 the First Respondent submitted a fresh application for a subdivision of the Property into Lots A and B as shown on the November 1988 plan. This followed a meeting with the Permanent Secretary in the relevant Ministry and the Director of Planning. The letter noted that since the previous application the Department of Planning had approved the construction of a house on one of the Lots and that the First Respondent had obtained a right of access to that Lot. By a letter from OBM dated 18th December 2007 the Petitioner objected to the application, which was refused on 18th June 2008.

32. On 16th September 2008 the First Respondent submitted a notice of intention to appeal. By a letter from OBM dated 20th October 2008 the Petitioner objected to the appeal.

33. The Planning Inspector's report to the Minister dated 7th April 2009 explains in some detail why the application was refused:

> The application as submitted on the 28th November 2007, seeks approval to create an additional lot, for a total of two lots, with access off Eve's Hill Lane. Lot A is proposed to be 6,566 square feet in size, while Lot B is proposed to be 5,005 square feet which is undersized. A residential building exists on each of the proposed lots …
>
> . . . . .
>
> The minimum lot size permitted under Paragraph 7.7(1), (a), Section 7 of the Bermuda Plan is 6,000 square feet. The proposal is applying for the creation of an undersized lot and as such Paragraph 7.8, Section 7 of the

> Bermuda Plan applies. The proposal is not compliant with Paragraph 7.8(a), Section 7 of the Bermuda Plan 1992 Planning Statement in that each lot created will not accommodate a residential building that was in existence or was approved prior to commencement day, which under Definition 15.12, Section 15 of the Bermuda Plan 1992 Planning Statement is the 3rd July 1992.
>
> . . . . .
>
> The application was refused for the following reason:
>
> The proposal does not comply with Paragraph 7.8(a), Section 7 of the Bermuda Plan 1992 Planning Statement in that each lot created will not accommodate a residential building, which was in existence or was approved prior to commencement day, which is defined under Definition 15.12, Section 15 of the Bermuda Plan 1992 Planning Statement as the 3rd July 1992.

34. In recommending that the appeal be rejected, the Planning Inspector commented:

> … the Appellant's own case makes little attempt to justify the exercise of discretion in allowing the appeal, save to suggest that it would regularise the status quo. For example, why does the proposed sub-division create lots of 6,566 square feet (Lot A) and 5,005 square feet (Lot B), rather than attempting [to] minimise the extent of non-conformity of the undersized lot by creating lots of 6,000 and 5,571 square feet respectively? A letter of consent from the objector would also have helped the appellant's case and would no doubt have been forthcoming had the appellant taken the trouble to address the objector's extant concerns about the boundary treatment and the excess soil on site.

35. On 1st May 2009 the Minister dismissed the appeal.

36. The issue of the removal of soil, or "spillage", from Lot B is important. Today, the middle area of the Property is covered with spillage comprising earth mixed with rocks, stones, and bits of building materials such as pipes. Much of this is covered by dead vegetation. I am able to say this from my

own observations on a site visit and from photographs taken by OBM Limited ("OBM") in 2008.

37. Colin Campbell, an architect and director of OBM, has been helping the Petitioner deal with the First Respondent in relation to subdivision. He gave evidence on her behalf. Although he was not called as an expert witness, I accept that as an architect his observations of the physical condition of the Property were informed by an expert eye. He noted that concrete was visible on the surface of the spillage, which suggested that there may be more concrete below the surface.

38. The spillage gives rise to various factual issues: (i) where did it come from? (ii) How far, if at all, does it encroach upon the boundaries of Lot B? (iii) Does it damage or give rise to a risk of damage to Lot B?

39. Issues (i) and (ii) can be taken together. While building the house the First Respondent excavated the upper area of the Property and dumped the spillage onto the middle area. The Petitioner gave evidence that while the construction was going on she saw the spillage being put onto Lot B. She said that some of it fell onto her back yard. She said that she never saw all of it, but that a lot of it was falling into her yard.

40. Mr Campbell prepared an architects' drawing dated 16th January 2014 showing both a bird's eye view and a cross-section of the proposed subdivision of Lots A and B. This showed spillage encroaching 20 feet beyond the boundary of Lot B as shown in the November 1988 plan. He stated that he was unable to say at present exactly how far spillage had encroached onto Lot B but that this was capable of being determined.

41. The First Respondent accepted under cross-examination that it was necessary to push material down the slope in order to level the garden area behind his house. But he stated that he had put stakes in place to mark the boundary between Lots A and B and had been careful to ensure that nothing went beyond those stakes. He suggested that any spillage encroaching on Lot B did not come from Lot A and suggested that it may have come from

the next door property, which also used to dump material on the middle area of the Property.

42. The First Respondent stated that he wasn't aware of any rocks going down the slope or falling onto the Petitioner's yard. But he accepted that disused building material used to level the garden area was thrown down the slope.

43. I am satisfied that spillage has encroached on Lot B. I accept that neighbours have used the middle area of the Property as a dumping ground and that this may be the source of some of the spillage. But, as a substantial quantity of earth and debris from the First Respondent's construction work was dumped at the top of the slope, I draw the reasonable inference that it has moved down the slope and is the source of most of the spillage that has encroached upon Lot B.

44. As to (iii), Mr Campbell stated that based upon his observations there was no evidence that the spillage on Lot B had been compacted or dealt with in an engineered fashion. The First Respondent confirmed this, stating that whereas he had hired a one ton machine to compact his garden he had taken no steps to compact the hillside. Mr Campbell explained that with excess moisture, eg from heavy rain, the soil could become fluid and flow down the slope. He stated that trees swaying in the wind and tree roots could dislodge soil. As the existing trees grew larger, the risk of slippage would increase. He noted that a large amount of material had already fallen away on one corner of Lot B.

45. The material appeared to Mr Campbell to be too loosely packed and dangerous to be left unrestrained for the long term. He suggested that the remedy was to clear the earth from Lot B and build a retaining wall. He was not a cost estimator, but, based on his prior experience, if the wall was built along the boundary between Lots A and B as shown on the November 1988 plan, the cost could easily come to $50,000 or more. Building the wall further up the hill would require a deeper and taller retaining wall and would be more costly.

Statutory scheme

Partition Act 1885 ("The 1885 Act")

46. Section 2 of the 1885 Act provides that a co-tenant may petition the Court for partition. Section 3 provides that the Court may, if it thinks fit, order the partition of the land among the co-tenants "*in the most equitable and advantageous manner*". The section also provides for the appointment of a commission of three people to inspect the land and report to the Court how it the land may best be divided. I am satisfied that the appointment of a commission is optional. On the relatively straightforward facts of this case I would have no need of its assistance.

47. However, partition is not a device to circumvent the law of real property or planning. Any order for partition must accurately reflect the co-tenants' beneficial interests in the property, having regard in a family context to such cases as Stack v Dowden [2007] 2 AC 432, HL and Jones v Kernott [2012] 1 AC 776, HL.

48. Moreover, an order for partition by sub-division of the property takes effect subject to the grant of planning permission for the subdivision. This follows both from section 35B of the 1974 Act, the relevant part of which is set out above, and from the decision of the Privy Council in Patel v Premabhai [1954] AC 35 at 47. In that case the Committee considered an Ordinance in Fiji which provided that there could be no subdivision of land without the approval of a statutory Board. The Committee ruled that the Ordinance did not prohibit a decree of partition but rather the subdivision of the land which would otherwise have resulted from the decree.

49. Section 8 of the 1885 Act provides that when any partition is made and completed under the Act, the Court may, if it thinks fit, order a sum of money to be paid "*for equality of partition*" by one co-tenant to another. For example, where the actions of a co-tenant on one part of the property to be

subdivided have detracted from the value of the land to be apportioned to another co-tenant.

Partition Act 1914 ("the 1914 Act")

50. Sections 1 and 2 of the 1914 Act provide that where, if the Act had not been passed, the Court might have decreed or ordered a partition, the Court may if it thinks fit direct a sale of the property instead. Under section 1, the Court can order a sale if it appears to the Court that this would be more "*beneficial*" to the interested parties than a division.

51. It has been held that "*beneficial*" means beneficial in a pecuniary sense. See the judgment of Sir George Jessel MR in Drinkwater v Ratcliffe LR 20662 Eq 528 at 533, where he analyses sections 3 and 5 of the Partition Act 1868 of England and Wales, which are equivalent to sections 1 and 2 of the 1914 Act:

> Then, again, I am to direct a sale if I am of opinion that the sale would be more beneficial for the parties interested. What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment, I must look merely to the monetary results.

52. In the subsequent case of Pitt v Jones (1879) LR 11 Ch D 78 at 81, Sir George Jessel MR stated that the meaning of the Legislature was that a sale should take place when the property was of such a character that it could not reasonably be partitioned. The correctness of his reasoning was not disputed by a majority of the House of Lords when the case went there on a further appeal.

53. Today, when considering partition under the Trusts of Land and Appointment of Trustees Act 1996, the courts in England and Wales take a broader approach and seek to do justice between the parties. See, eg, Murphy v Gooch [2007] 2 FLR 934, EWCA, *per* Lightman J at para 14; and Ellison v Cleghorn [2013] EWHC 5 (Ch), *per* Briggs J at para 46.

54. The broader approach has much to recommend it. In my judgment, in the circumstances of contemporary Bermuda it is appropriate for the Court to take a holistic approach to the meaning of "*beneficial*" and treat pecuniary benefit as but one element, albeit a core one, of an attempt to do justice between the parties. Non-pecuniary factors might be particularly relevant, for example, where a sale would benefit some parties but not others.

55. In construing "*beneficial*" in this way, I draw upon the principle of statutory interpretation that a statute is said to be "*always speaking*". This principle was explained with great clarity and force by Lord Steyn in R v Ireland [1988] AC 147 at 158:

> Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that "*An Act of Parliament should be deemed to be always speaking*:" Practical Legislation (1902), p. 83; see also Cross, Statutory Interpretation, 3rd ed. (1995), p. 51; Pearce and Geddes, Statutory Interpretation in Australia, 4th ed. (1996), pp. 90-93. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the 'always speaking' variety: see Royal College of Nursing of the United Kingdom v. Department of Health and Social Security [1981] A.C. 800 for an example of an "always speaking" construction in the House of Lords.

56. On the particular facts of this case, the broader definition of "*beneficial*" merely provides additional grounds for arriving at the same result as would be arrived at by applying its narrower definition.

57. There is no requirement under section 2 that the sale should appear to the Court to be beneficial. However the Court may not direct a sale under that

section if one or all of the other parties interested in the land undertake to purchase the share of the party requesting a sale. See Drinkwater v Ratcliffe at 531, approved on this point by a majority of the House of Lords in Pitt v Jones (1880) 5 App Cas 651 *per* Lord Blackburn at 659 and Lord Watson at 662.

Discussion

58. The parties are agreed that I should make an order under one or other of the Partition Acts. However the Petitioner and the Second Respondent seek an order for the sale of the property whereas the First Respondent seeks an order for its subdivision.

59. I have been asked to determine first whether there is in existence an agreement between the parties to subdivide the property which is enforceable by the First Respondent. I shall deal with the point quite briefly.

60. I find that it was an implied condition of the Agreement that neither party would act so as (i) substantially to detract from the value of the land to be allocated to the other party after subdivision or (ii) to create a hazard on that land that posed a real and substantial risk to the other party's person or property.

61. The First Respondent has in repudiatory breach of that condition caused spillage to encroach on Lot B. I am satisfied from the evidence of Mr Campbell that the spillage does pose a real and substantial risk to the Petitioner and her property. I am also satisfied that the encroachment has substantially diminished the value of Lot B in that it would make the Lot more difficult to sell and reduce the likely sale price.

62. A reasonable purchaser would be likely to require the spillage to be removed and steps taken to prevent the encroachment of additional spillage from further up the slope, or alternatively require a substantial reduction in the

purchase price. I accept Mr Campbell's evidence that the cost of such measures could easily come to $50,000 or more.

63. The Petitioner has by issuing these proceedings, in which she seeks an order for the sale of the Property, accepted that repudiation and elected to treat herself as discharged from her liability to perform any unperformed obligations under the Agreement.

64. I therefore answer the question posed in the negative. There is not in existence an agreement between the parties to subdivide the property which is enforceable by the First Respondent. It does not, however, follow that an order for partition of the Property under the 1885 Act would necessarily be inappropriate.

65. Although the legal owners of the Property are the Petitioner and the Second Respondent, it is owned beneficially by the Petitioner and the First Respondent as tenants in common. As it has yet to be subdivided, each has a half share in the undivided Property. This reflects their common intention when purchasing the Property, as evidenced by the fact that each contributed half of the purchase monies.

66. The First Respondent has through the development of Lot A increased the value of the Property. Any order for sale would require a payment for equality of partition by the Petitioner to reflect this. A sale would nevertheless not be in the First Respondent's pecuniary interest because the present slump in the property market due to the recession means that he would be unlikely to obtain a reasonable rate of return on the monies which he has invested in the Property. The First Respondent has no wish to buy out the Petitioner. Pecuniary matters aside, the First Respondent has worked hard to build a house on the Property and does not wish to move.

67. The Petitioner wishes to realise her interest in the Property. She is a senior citizen with a pressing need to move to a more accessible home. The Property could readily be partitioned. There is no evidence before me that the value of her interest in the Property would be greater if it were realised

from the sale of the undivided Property than if it were realised from the sale of Lot B alone. Subject to appropriate conditions, partition into Lots A and B would therefore satisfy the reasonable pecuniary and other needs of both the Petitioner and the First Respondent.

Conclusion

68. I am satisfied that the Court should make an order for partition of the Property into Lots A and B. The subdivision is of course subject to planning permission. I am satisfied that the boundary of the Property is as marked on the November 1988 plan. The boundary between the lots should reflect this. I therefore direct that, as recommended in the Planning Inspector's Report of 7th April 2009, Lot A should have an area of 6,000 square feet and Lot B an arrear of 5,571 square feet. Thus the boundary between the lots will not reflect the boundary on the November 1988 plan.

69. I am advised that the septic tank for Lot A is located on Lot B. I direct that it can remain in its current location in perpetuity and, contingent upon planning approval for the subdivision, I grant an easement to the occupants of Lot A permitting access to the septic tank.

70. The cost of applying for planning approval for the subdivision shall be borne by the First Respondent. This is fair because it is what the Petitioner and the First Respondent agreed.

71. Justice requires that the First Respondent should bear the cost of removing the spillage from Lot B and taking such steps as may be necessary to keep Lot B secure from the encroachment of further spillage from higher up the hillside, eg a retaining wall. This can be dealt with by way of a payment for equality of partition.

72. For purposes of dealing with spillage only, the boundary of Lot B shall be treated as the boundary marked on the November 1988 plan. This is because I accept the evidence of Mr Campbell that removing and preventing the

future encroachment of spillage from a point higher up the slope would be prohibitively expensive.

73. I therefore direct that the parties jointly instruct an appropriate expert to report back to the Court within 28 days of the date of this judgment. The cost of the expert shall be borne jointly by the Petitioner and the First Respondent. In that way, both parties can have confidence that the expert is independent.

74. The matters upon which the expert is to report are: (i) the extent of encroachment of spillage upon Lot B and the cost of its removal; and (ii) what, if any, measures should prudently be taken to prevent any further encroachment of spillage upon Lot B from further up the hillside and what they would cost. The purpose of the report is to provide an estimate for the overall cost of the work to be done. The estimate will form the basis for an equality payment to be made by the First Respondent to the Petitioner. She can then have the work carried out.

75. If the cost of the work proves to be greater than the estimate, the Court will order a further equality payment to make up the difference once the work has been carried out. If the cost proves to be lower than the estimate, the Petitioner must repay the difference to the First Respondent.

76. The cost of marking out (i) the boundary between Lots A and B for purposes of the sub-division, and (ii) the separate boundary shown on the November 1988 plan for purposes of dealing with spillage, shall be borne by the First Respondent. I see them as bound up with the cost of applying for planning permission.

77. There is liberty to apply as to the carrying out of these directions.

78. I shall hear the parties as to costs.

DATED this 18th day of March, 2014

Hellman J