



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 300

IN THE MATTER OF THE PARTITION ACTS

BETWEEN:-

BARBARA SMITH

Petitioner

-and-

- (1) DONALD SMITH
- (2) MILO SMITH
- (3) GLENN SMITH
- (4) ALLAN SMITH

Respondents

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: 14th April 2014

Mr Jaymo Durham, Amicus Law Chambers Ltd, for the Petitioner
The Respondents in person

1. The Petitioner seeks an order for the sale of property known as 5 Talbot's Lane, Smith's Parish, HS01 ("the Property"). Her claim is stated thus:

1. By way of Vesting Deed dated the 7 March 2001 and made between the Petitioner and Vernon Clifford Trott acting as Executors of the Estate of Wilson Ludwig Smith of the one part and the Petitioner of the other part [the Property] was vested unto the Petitioner in fee simple.

2. By virtue of the facts stated in clause 1 above, the Petitioner owns a one-fifth (1/5) interest in and of the Property.

3. The Property consists of a single unit 3 bedroom dwelling ...

4. The Petitioner no longer wishes to own the Property with the Respondents and wishes for the Respondents to purchase her interest in the Property or for the Property to be sold on the open market with the proceeds of sale being divided between the Petitioner and the Respondents.

.....

8. The Petitioner seeks an Order from this Honorable Court for the partition of the Property and the sale of the Petitioner's interest to the Respondents or in the alternative a sale of the Property on the open market.

2. By way of background, the late Andrew Smith left the Property to his wife, Gwendolyn Smith. She devised the Property to her five children in equal shares. One of her children was Wilton Smith ("Mr W Smith"). The Petitioner was his wife. As Mr W Smith died intestate, the Petitioner and their children inherited his one fifth interest in the Property under section 5 case 2 of the Partition Act 1974.

3. I have not seen a copy of the vesting deed but have seen a transfer notice dated 20th July 2001 filed by the attorneys Trott & Duncan which I accept as evidence of the vesting deed.

4. The Petitioner relies on section 2 of the Partition Act 1914. This provides:

Party interested may request sale

2. If in any such action for partition or on the hearing of any such petition as aforesaid where if this Act had not been passed, the Supreme Court might have decreed or ordered a partition, any party interested in the property requests the Supreme Court to direct a sale of the property, and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Supreme Court may if it thinks fit, unless the other parties interested in the land or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property and give all necessary or proper consequential directions.

5. I am satisfied that if this Act had not been passed the Supreme Court might have decreed or ordered a partition and that the Court therefore has jurisdiction to order the sale of the Property.
6. The Petitioner submits that she has an urgent need to realise the value of her interest in the Property as she has been served with a final demand from her bank dated 13th March 2014 informing her that as at 31st March 2014 her loan account will be \$43,628.21 in arrears. The total amount outstanding on the loan is \$922,879.10. She needs her share of the net proceeds of sale in order to pay off the arrears.
7. The Property was professionally valued in December 2013 as having a market value of \$400,000.
8. The application for sale is opposed by the remaining four children or their successors in title. I heard from the First Respondent, Donald Smith (“Mr D Smith”), who is aged 79 years, in person, and from his daughter, who spoke on his behalf. He swore an affidavit in which he stated:

1. I have been the primary person looking after this Property since 2000.

2. In addition I was the sole caregiver for my mother who also lived here until she went to reside in a rest home.
3. I have covered all expenses relating to the Property since 2000 – eg utility bills, maintenance, home insurance, etc.
4. It was my mother’s desire for me to remain living at the Property for the remainder of my life.

9. I also read an affidavit from Allan Wayne Brunell Smith (“Mr AWB Smith”), who is the nephew of Mr D Smith and the son of the Fourth Respondent, Allan Smith, objecting to the sale of the Property. He stated:

1. It was my grandparents’ wish that the Property never be sold on the open market and that it never leave the family.
2. It was my grandparents’ wish that the Property never be sold unless it was sold to someone within the family.
3. My grandparents would not approve of the family fighting over the Property in this way.
4. I am uncomfortable with asking my uncle, who was the sole caregiver for my grandmother during her last few years alive, to leave, as he has nowhere to live.
5. I am uncomfortable with asking my uncle, who has covered all expenses relating to the Property since 2000 – eg utility bills, maintenance, home insurance, etc, to leave as he has nowhere else to live.
6. It was my grandmother’s desire for her children to have the option to remain living at the Property for the remainder of their lives.

10. I heard from Mr AWB Smith in person, and also from the son of the Second Respondent, Milo Smith.

11. I raised with the parties my recent judgment in Holder v Holder Civ 2013 No 12. In this case I considered section 1 of the 1914 Act , which provides:

Supreme Court may order sale instead of partition

1 If in any action for the partition of any land in Bermuda or on any petition for the partition of any such land, where if this Act had not been passed the Supreme Court might have decreed or ordered a partition, it appears to the Supreme Court that by reason of the nature of the property to which such action or petition relates or of the number of the parties interested therein, or of the absence or disability of some of the parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial to the parties interested than a division of the property between or among them, the Supreme Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any other or others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

12. Having reviewed the case law, I concluded at para 54:

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.

13. I considered whether the Court could adopt a similar approach in the instant case. However, as I stated at para 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.

14. On reflection, therefore, the Court does not have the flexibility under a section 2 application that it does under a section 1 application.

15. Moreover, the Respondents face the difficulty that whatever the late Gwendolyn Smith's intentions regarding lifetime occupancy of the Property by one or more of her children, any such intentions did not find expression in her will, as none of the children were granted a life interest in the Property.
16. In the circumstances, Mrs Smith is entitled to an order for sale of the Property. It is of course open to the Respondents or their children to undertake to purchase her share, thereby obviating the need for a sale, although I appreciate that it may not be practicable to raise the necessary monies.
17. I have no evidence that Mrs Smith's late husband ever sought an occupation rent from Mr D Smith, who appears to have occupied the premises by way of a family arrangement. I therefore do not propose to make any order for payment of back rent.
18. In so finding, I have in mind the conclusion that I reached in Pough v Raynor Civ 2012 No 48 that the Court will order payment of occupation rent where this is necessary to do justice between the parties.
19. I do not, for the present, propose to order payment of occupation rent going forward. If, however, the sale were to take longer than three months, I should be prepared to revisit that order.
20. I shall hear the parties as to the terms of the order and to costs.

DATED this 14th day of April, 2014

Hellman J