BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

CV No. 1412 of 2014

BETWEEN:

STANLEY O'NEAL QUINTYNE **CLAIMANT**

AND

OWEN HUGH ALBERT QUINTYNE **DEFENDANT**

Before Dr. the Honourable Madam Justice Sonia L. Richards, Judge of the High Court

2016: March 11, June 17

2019: January 24

Ms. Gale B. Prescod, Attorney-at-Law for the Claimant.
Ms. Kim Marshall, Attorney-at-Law for the Defendant.

DECISION

Introduction

[1] The issue before the Court is whether the Defendant should be ordered to pay the Claimant's costs consequent upon the Defendant's decision to resolve the matter between the parties, and in favour of the Claimant.

Background

[2] The parties are brothers with an apparently strained relationship. They became joint owners of a parcel of land, at Parris Hill in the parish of St. Joseph, by virtue of a conveyance dated 30 March 1992. They held the land as tenants-in-common in equal shares, and they now live in their separate homes on the land.

[3] By letter dated 11 December 2009, the Claimant's counsel advised the Defendant of the Claimant's intention "to have the land surveyed and subdivided into 2 lots and, thereafter, have the lot on which [the Claimant] resides, conveyed to himself". There is no evidence that the Defendant replied to this correspondence or made known any objections to the proposal at that time.

[4] The Claimant applied to the planning department for permission to sub- divide the land in early 2010. The subdivision was approved on 04 June 2010. The Claimant paid for the application, a survey and a plan of the land. Copies of all relevant documents were forwarded to the Defendant under cover of a letter dated 25 January 2011. In this letter the Defendant was asked to remove a wall that was obstructing the right of way delineated on the plan.

[5] Another letter dated 17 March 2011 was sent to the Defendant. He was urged to remove the wall, failing which legal action would be taken by the Claimant

"to pursue an order for the partition of the land into two lots, as provided under Section 45 of the Property Act…, in addition to costs and expenses, without further notice to you".

[6] The March letter galvanized the Defendant into action, and he sought legal counsel. In a letter to the Claimant's counsel dated 01 April 2011, the Defendant's counsel outlined the Defendant's concerns about the proposed subdivision as follows:

> "1. [The Defendant] was never consulted about the proposed subdivision prior to [the Claimant] having same completed and he was never given the opportunity to have any input into how the subdivision should be carried out.
>
> 2. [The Defendant] therefore reserves the right not to recognise the proposed subdivision in the terms shown on the plans prepared by [the] Land Surveyor.
>
> 3. The Right-of-Way as shown on the proposed subdivision plan is for the benefit of Lot 2 – i.e. the lot identified for [the Defendant] and [the Claimant] has been seeking to impede the access to this right-of-way".

[7] A meeting was convened on site on 27 April 2011, between the parties, their respective counsel, and the land surveyor. As a result of the meeting, an amended plan was submitted to the planning department. The amended plan was approved on 14 November 2011, and the certificate of compliance issued on 31 January 2012.

[8] Counsel for the Claimant informed the Defendant's counsel that the Claimant intended to proceed with the partition of the respective interests in the land. Another site meeting of the parties was requested. Three letters dated 04 May 2012, 11 October 2012, and 17 January 2013 were forwarded to the Defendant's counsel requesting the meeting. A draft Deed of Partition was enclosed in the October letter. And in the January letter, the Defendant's counsel was warned that "Should we not hear from you within 14 days of the date hereof, we are instructed by our client to proceed through the law Courts for a declaration regarding the captioned land". There is no evidence that the request for a meeting was honoured by the Defendant.

[9] The Claimant filed these proceedings three years later on 16 September 2014. He sought orders for:

1. the partition of his interest in the land;
2. the subdivision of the land in accordance with the grant of planning permission;
3. the execution of a conveyance transferring the legal interest in Lot 1 to the Claimant;
4. costs, and
5. any other order that the Court deems fit.

[10] The parties first appeared before the Court with their respective counsel on 27 January 2015. The matter was adjourned by consent of the parties to 31 March 2015. On that date both counsel appeared and the matter was further adjourned to 29 April 2015. The Court also made a final order for the Defendant to file and serve his Defence on or before 24 April 2015.

[11] On 29 April 2015, counsel for the Defendant did not appear. However, counsel for the Claimant informed the Court that Counsel for the Defendant had communicated her client's willingness to sign the Deed of Partition. And on 07 July 2015 the Court granted a long adjournment to 10 November 2015to allow the partition to be finalized between the parties.

[12] On 10 November, counsel for the Claimant reported to the Court that the Defendant had not yet signed the partition document. Both the Defendant and his counsel were absent on this occasion. The Court made the following orders:

> "1. Unless the Defendant executes the Deed of Partition on or before 23 November 2015 the Registrar of the Supreme Court is to be directed to execute the Deed of Partition on behalf of the Defendant.
>
> 2. The Defendant is to be notified of this Order by service on his Attorney on record Ms. Kim Marshall of 5 Marine Trading Complex, Black Rock Main Road, St Michael".

[13] Counsel for the Claimant appeared on the adjourned date of 09 December 2015, and informed the Court that the Defendant had signed the Deed. Once again there was no appearance by the Defendant's Counsel. An application for costs was made by the Claimant's counsel. The Court ordered the parties to file written submissions on costs. A summons with a warning was also issued to the Defendant in care of his counsel on record.

[14] Both parties and their respective counsel were present in Court on 11 March 2016. The Defendant's counsel informed the Court that it was necessary for the Defendant to place certain background information before the Court by way of affidavit. It was submitted that the affidavit evidence was critical to any consideration of costs. Permission was granted for the filing of the affidavit, and the matter adjourned for the consideration of any written or oral submissions by counsel.

The Submissions

[15] The written submissions on behalf of the Claimant were filed on 29 February 2016. Counsel for the Claimant argued that it was the Defendant's lack of co-operation which forced the Claimant to seek the assistance of the Court in this matter. In addition, neither the Defendant nor his counsel appeared in Court on a number of occasions. The Court was urged to award fixed costs in the sum of $11,515.00 (inclusive of VAT), disbursements in the sum of $285.00,

and half the land surveyor's costs of $1,610.00. The total claim for costs is therefore $13,410.00.

[16] The Defendant's Affidavit on costs and the written submissions on his behalf were both filed on 29 April 2016. In the 49 paragraphs of his Affidavit, the Defendant took the Court on a journey from the initial offer by his mother's landlord to sell her the land; the purchase of the land by the parties; and the proceedings before this Court. The Affidavit is divided into 3 main sections which address the Claimant's conduct before the proceedings; the Claimant's conduct during the proceedings; and the Claimant's conduct post proceedings.

[17] Both the Defendant and his counsel submit that it would be unjust to make a cost order in the Claimant's favour. The Defendant contends that he incurred the greater portion of the costs when the land was acquired (para. 4 Affidavit). He also alleges that the documentation was being finalised by the two counsels and that adjournments were agreed between counsel (para. 33 of Affidavit). He adds that, apart from the filing of documents, his counsel undertook the responsibility of having the matter settled amicably "thereby making litigation unnecessary" (para. 46).

[18] According to counsel for the Defendant, the number of adjournments were necessary in order to allow the documents to be completed. It was not fair to

mulct the Defendant in costs for a matter that did not proceed beyond case management.

Analysis

[19] The Defendant was warned twice in correspondence dated 17 March 2011, and 17 January 2013, that the Claimant would seek the Court's assistance to partition the land if the Defendant proved to be unwilling to assist in that process. The March letter also referred to costs and expenses. When the matter was eventually filed in September 2014, the Claimant also asked for costs. (See para. [9] supra).

[20] Although the Deed of Partition was voluntarily executed by the Defendant, it is a fact that the Claimant incurred legal and other costs in order to file his application. The question of costs was squarely before this Court, and should not have come as a surprise to the Defendant. Additionally, it was not unreasonable for the Claimant to seek the assistance of the Court for the partition of the land. The unchallenged evidence is that the Claimant requested a meeting with the Defendant on three occasions between May 2012 and January 2013. And he exercised great forbearance by waiting almost two years before filing his claim.

[21] This Court is also of the view that what transpired between the parties, prior to their purchase of the land, is largely irrelevant to any determination of costs.

It is an agreed fact that the parties were co-owners of the land as tenants-in-common. Either party was entitled to demand the partition of the land, subject to the approval of the town planning department. There is no evidence of any agreement between the parties that the Claimant, prior to partition, was to refund any part of the additional costs borne by the Defendant for acquisition of the property.

[22] A time came when the Defendant acquiesced in the partition process. The revised plan submitted to town planning had the blessing of the Defendant and his then attorney-at-law. But, thereafter, a spirit of recalcitrance settled upon the Defendant, and he was not moved to co-operate until the matter came before this Court.

Calculation of Costs

[23] Costs are calculated in accordance with the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR"). The successful party is generally entitled to costs (Rule 64.6 (1)), but the Court has a wide discretion in determining who pays costs and how much is to be paid (Rules 64.6 (2) and (3)). (See also S.85 (1) of the Supreme Court of Judicature Act, Cap. 117A; **Blackman v. Gittens-Blackman et al, Civ. App. No. 6 of 2012, C.A. B'dos, decision dated 15 May 2014,** at para. [39]; and **Rochamel Construction Limited v. National**

Insurance Corporation, Suit No. 10 of 2003, C.A. St. Lucia, decision dated 24 November 2003, at para. [8]).

[24] Counsel for the Claimant calculated his costs according to the prescribed costs regime under Rule 65.5 of the CPR. As the claim is not for a monetary sum, the value of the claim is $50,000.00. (See Rule 65.5(2) (b) (iii)). Applying paragraphs (a) and (b) of the Scale of Prescribed costs at Appendix B of Rule 65, counsel arrived at cumulative costs of $14,000.00. This figure was then discounted to 70 percent in accordance with stage (c) of Appendix C of Rule 65. Counsel considered that the case reached the stage of case management, and that the prescribed costs totalled **$11,515.00**.

[25] The reality of this case is that no Defence was ever filed. By agreeing to sign the documents, the Defendant conceded that the law was on the side of the Claimant. The Defendant also precluded any necessity for either continued case management or a trial. The majority of appearances were for the Court to monitor the progress between the parties and their respective counsel. There were no complex issues to be researched by counsel or resolved by the Court.

[26] Another consideration is that the Claimant never discontinued this action, and the Court was not informed of any agreement between the parties for a discontinuance. The Claimant is entitled to recover the reasonable costs arising from his case. These costs include the legal fees incurred by retaining

counsel to file the fixed date claim form, appearances by counsel, disbursements, and submissions on costs.

[27] The costs will not include conveyancing fees paid by the Claimant. Even if this matter had not occupied the attention of the Court, both parties would have incurred legal fees for the partition of the land. The Claimant's legal fees in this regard were not incurred as a result of his court action. Land surveying and town planning costs will not be included because there is no evidence that the Claimant ever called upon the Defendant to share in the expenditure that was preliminary to the partition of the property. However, the Defendant will pay half of the cost of adjudication, recording and stamp duty. Although partition was the initiative of the Claimant, the Court noted that the Defendant acquired a larger lot than the Claimant, plus a right of +way over the Claimant's land.

Disposal

[28] Judgment is entered for the Claimant with costs awarded to the Claimant in accordance with the guidelines set out at paragraphs [26] and [27] of this judgment.

Sonia L. Richards
Judge of the High Court