

HALLETT, J.A.:

This is an appeal from a decision of Carver J. rendered on July 19th, 1994, following a protracted dispute between the parties over a 23 acre parcel of shore front property on Shelburne Harbour which they had acquired when living common law; the relationship had come to an acrimonious end prior to the start of legal proceedings.

On May 4th, 1992, the appellant commenced an action under the **Partition Act**, R.S.N.S. 1985, Chapter 333. The statement of claim sets out that his offers to the appellant to either buy her interest or to sell his interest to her were rejected. Paragraphs 9 and 10 of the statement of claim are very relevant to the issues before us.

" 9. The Plaintiff states that under these circumstances in order to be able to deal with his interest in the subject property it is necessary that the property be sold pursuant to the provisions of the Partition Act.

10. The Plaintiff further states that as the property includes a single family dwelling it would be impracticable to physically divide the property in that any such division would prejudice one or the other of the parties."

The relief sought in the statement of claim was for an Order for sale pursuant to s. 28 of the **Partition Act**.

Following one change of solicitors by the appellant a defence was filed some eight months after the delivery of the statement of claim. In the defence the appellant admitted the assertions in paragraphs 9 and 10 of the statement of claim. In addition, paragraph 3 of the defence stated:

" The Defendant further states that she is agreeable to the property referred to in the Statement of Claim be sold and the net proceeds realized therefrom to be divided between the parties but not be divided on an equal basis."

On February 21st, 1994, Justice Carver made the following Order:

" 1. THAT the property which forms the subject of these proceedings shall be forthwith placed on the open market for sale;

2. THAT the original listing price shall be a figure set by a realtor who is knowledgeable of property values in the area where the subject property is located;
3. THAT no reasonable offer shall be refused by the Plaintiff or the Defendant;
4. THAT both the Plaintiff and the Defendant shall have the option of re-appearing before this Court for a determination as to whether an offer which has been received is "reasonable";
5. THAT both parties shall co-operate fully in the listing and sale of the property and each is to, without delay, sign whatever documentation may be required to bring the sale to its ultimate conclusion;
6. THAT the net proceeds of the sale, after legal and real estate expenses associated with the sale are deducted, are to then be divided equally between the parties subject only to a further, adjustment in favour of the Defendant for the Plaintiff's share of taxes and insurance paid by the Defendant in relation to the subject property. Prior to this adjustment being made, proof of payment of these taxes and insurance is to be provided by the Defendant to the Plaintiff.
7. THAT each party will bear their own costs to the date of this Order and will share equally all costs incurred in the completion of the sale of the subject property."

There was no appeal taken from that Order.

On May 24th, 1994, Justice Carver, having found that the parties could not agree upon a sales agent, ordered that the property be listed with D.R. Leggett at a figure to be established by him. There was no appeal from that order.

On July 19th, 1994, the respondent made an application to Justice Carver supported by an affidavit of the respondent's counsel that D.R. Leggett suggested a listing price of \$115,000 and that a purchase offer for that amount had been received from a Mr. Richard and was acceptable to the respondent. The affidavit concluded:

- " 6. This offer of \$115,000.00 has as well been passed along to the Defendant's solicitor but once again she has neither confirmed nor denied her acceptance of the same.
7. The Plaintiff at this time I am advised holds the view that the

Defendant will not deal with this offer in a timely fashion in the hope of once again frustrating or delaying the sale of the property.

8. The Plaintiff I am advised further holds the view that the offer is a fair and reasonable one and he has accordingly instructed me to seek a further Order from this Court approving the sale of the property in conformity with the terms of this offer even if the Defendant hereafter takes the position that it is not acceptable to her."

After hearing counsel for the parties Justice Carver decided that he would order that the sale to Mr. Richard be completed.

On July 24th, 1994, the respondent filed a notice of appeal asserting that Justice Carver (i) erred in his decision ordering the property to be sold to Mr. Richard for \$115,000; (ii) erred in ordering the sale before "determining whether or not the property could be partitioned"; (iii) erred in ordering the property to be sold without having the property appraised so as to determine fair market value; and, (iv) erred in not allowing the appellant to accept a portion of the property rather than forcing the sale of her interest in it.

The appellant asks this Court to reverse the trial judge and either remit the matter back to him or another justice of the Supreme Court for a determination of whether or not the property should be partitioned under the provisions of the **Partition Act** and, if not, "that the lands be then appraised at fair market value giving the appellant and the respondent first the right to purchase the share of the other before offered for sale by public auction or otherwise."

On July 25th, 1994, Justice Carver signed an Order giving effect to his decision of July 19th. The Order provided that the Richard's offer "shall be deemed by virtue of this Order" to have been accepted by the appellant.

Appellant's Position on Main Ground of Appeal

Counsel for the appellant argues that by reason of the provisions of s. 17 of the

Partition Act the trial judge was required to consider a partition and if he decided against making a partition he was required under s. 24 to consider if he should set off part of the property to a party upon that party paying compensation. Sections 17 and 24 state:

" 17. If the defendant fails to appear or to deliver a defence, or if, after a trial, it appears that partition should be made, the Court or a judge shall make an order for the partition of the land, which shall specify the persons entitled to share in the partition ordered and the share to which each is respectively entitled.

24. (1) When the land, of which partition is sought, cannot be divided without prejudice to the owners, or when any specific part thereof is of greater value than the share of any party and cannot be divided without prejudice to the owners, the whole land, or the part so incapable of division, may be set off to any one of the parties who will accept it, upon payment by him to any one or more of the others of such compensation as the commissioners determine.

(2) The partition in such case shall not be confirmed by the Court or judge until all the sums so awarded are paid to the parties entitled thereto, or secured to their satisfaction."

Counsel for the appellant argues that the scheme of the **Act** requires that the trial judge only order a sale pursuant to s. 28 of the **Act** after he has considered the matter of partition and the setting off to one of the parties of the part of the property.

Disposition

I respectively disagree with the submission that the trial judge had a duty under the **Partition Act** to consider these two matters prior to ordering a sale. Sections 4 and 5 of the **Act** provide:

" 4. All persons holding land as joint tenants, coparceners or tenants in common, may be compelled to have such land partitioned, or to have the same sold and the proceeds of the sale distributed among the persons entitled, in the manner provided in this Act.

5. Any one or more of the persons so holding land may bring an action in the Trial Division of the Supreme Court for a partition of the same, or for a sale thereof, and a distribution of the proceeds among the persons entitled."

The respondent did not seek a partition but a sale. That was his right under s. 5; he could either apply for partition or for a sale. The appellant in her defence agreed that the property be sold. Upon reading the Act as a whole I am satisfied that the provisions of s. 17 and s. 24 are only relevant if a partition is sought. As none was sought in this case there was no duty on the trial judge to consider a partition and, in fact, it would have been improper for him to do so given the pleadings. Furthermore, the Order for sale made on February 21st, 1994, was not appealed nor was an application made to this Court to extend the time for filing an appeal from that Order although the appeal taken challenges the effect of the Order of February 21st, 1994.

The learned trial judge did not err in failing to order that the property be appraised before approving the sale to Mr. Richard. The appellant admitted in her defence that the land could not be divided without prejudice to the parties. Section 28(1) of the **Partition Act** provides:

" 28(1) Where

(a) the land, or any part thereof, cannot be divided without prejudice to the parties entitled; or

(b) any party is, by reason of infancy, insanity or absence from the Province, prevented from accepting such land, or part thereof, incapable of division under this Act,

the Court or a judge may order that such land shall be sold after such notice and in such manner as the Court or judge directs, and that the net proceeds of such sale shall be divided among the parties entitled."

In addition, **Civil Procedure Rule** 47.14 to 47.17 gives a Supreme Court Judge broad power to order sales of property where it appears necessary or expedient and to direct how the sale is to be effected. The combined effect of the **Partition Act** and the **Rules** gave

Justice Carver broad power respecting the sale of the property which power he exercised in making the Order of February 21st, 1994. The Order provided for a reasonable method of ascertaining market value and provided that either party could apply to the court for determination if any offer received was reasonable.

This Court will not interfere with the exercise of a discretion by a trial judge unless he has proceeded on incorrect principles or a patent injustice has resulted from his order. The Order of February 21st, 1994, provided for a reasonable method in determining fair market value. Apart from the fact that no order from that appeal was taken there is no proper basis upon which this ground of appeal could be allowed.

The learned trial judge did not err on July 19th, 1994, when he refused to accede to the appellant's submission that she be allowed to accept a portion of the property. This follows because the parties had requested a sale and not a partition and the court had so ordered on February 21st, 1994. There was no appeal from that Order. That issue was behind the parties when the appellant appeared before the court on July 19th, 1994 with yet another new counsel seeking such an Order.

The learned trial judge did not err in ordering the acceptance of the Richard offer as the Order of February 21st provided a mechanism for either party to apply to the court for a determination if any offer received was reasonable. The respondent so applied to the court. On July 19, 1994, Justice Carver heard representations from counsel and exercised his discretion to approve of the offer. He did not err in principle nor does his order result in a patent injustice. Therefore there is no basis upon which his Order should be set aside. Given the history of the proceedings and the conduct of the appellant the decision was perfectly reasonable.

The appeal is dismissed with costs to the respondent in the amount of \$750 plus disbursements. The respondent's counsel sought an order for solicitor and client costs which

we have declined to award with respect to the appeal. There will have to be a report to the court with respect to the sale. At that time Justice Carver can deal with the cost issues respecting the proceedings before him.

Hallett, J.A.

Concurred in:

Hart, J.A.

Freeman, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

AMY H. DELOISIO (also known as
AMY H. D'ALUISIO)

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)
Appellant)

- and -
FOR

REASONS

BY:
JOSEPH D. DOLEJS)

JUDGMENT

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Respondent)

HALLETT, J.A.

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