SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 558 OF 1993

BETWEEN:

CORNELIUS CHARLES

Plaintiff

and

RUTH ROGERS
ALGITA ALEXANDER

Defendants

Appearances:
Mr O R Sylvester QC CMG and Ms N Sylvester with him for the Plaintiff
Mr J Delves for the Defendants

1999: November 22, 23, 29

JUDGMENT

[1] **MITCHELL, J.:** This was a land dispute between a half-brother and his half-sisters over lands previously owned by their deceased father, Caesar Rogers (hereinafter "the Deceased.") The Plaintiff is a police officer. The 1st Defendant is a road driver, an overseer on a public works road gang. The 2nd Defendant is a half sister by yet another mother, and her occupation is unknown.

[2] By the statement of claim filed on 11th February 1993 the Plaintiff claimed as owner in possession two parcels of land at Simon. The smaller parcel consisted of 22 poles. The larger parcel consisted of the remainder of an original parcel of 4 acres 1 rood and 30 poles after the prior sale of

portions of it by the Deceased. The Plaintiff claimed that in 1983 the 1st Defendant wrongfully entered his lands and cut down trees and cultivated the larger parcel of land. He claimed $4,410.00 special damages for the destroyed trees. Further, in about February 1983 the 1st Defendant moved into the Plaintiff's house on the larger parcel. In or about 1987 the 2nd Defendant wrongfully built a house on the smaller parcel. She also wrongfully cultivated lands of the Plaintiff. The Defendants were requested to leave the Plaintiff's property, but have failed to do so. On or about 24th November 1993 the 1st Defendant began to build a concrete house on the larger parcel. The Plaintiff claimed special damages, injunctions and orders.

[3] By the defence filed on 19th January 1998 the Defendants claimed that the lands had belonged to the Deceased, the common father of the parties. The Defendants had lived on and cultivated the land for the past 30 years or so. The Deceased had sold part of his real estate to the 1st Defendant. He also gave part of his land to Olive Birch, the mother of the 2nd Defendant. He had built a house for her which house was eventually repaired by the 2nd Defendant. The Plaintiff had been on hostile terms with the Deceased during his lifetime. The Deceased had died on 25th December 1982. Eustace Peters, the brother of the Deceased, had retained a Solicitor to administer the Deceased's estate, but the papers were misplaced. In a counterclaim the Defendants pleaded that on 9th January 1992 the Plaintiff had been granted letters of administration with the will annexed in the estate of the Deceased. The Plaintiff had claimed he was the sole devisee named in the will. The Defendants denied that the paper writing proved by the Plaintiff was a true will. The Deceased had been hospitalized for the last 36 days or so before his death. The Deceased had suffered a debilitating stroke at home and was immediately paralysed. He could neither move his hands, nor could he speak, or feed himself. He had been in no condition to instruct, write or attest to a last

will. The Defendants claimed an order cancelling the grant of letters of administration, and an order that the Deceased died intestate leaving him surviving the Plaintiff and the Defendants the only persons entitled to share in his estate. The 1st Defendant claimed an order that she be declared administratrix of the estate of the Deceased. By an amended defence and counterclaim filed with leave on 28th October 1999 the Defendants added a Limitation Act defence. In their counterclaim they also added the allegation that the Deceased did not know of or approve of the contents of the alleged will. By an amended reply and defence to counterclaim filed on 18th November 1999 the Plaintiff claimed that any occupation and/or cultivation of the lands by the Defendants was with the permission and consent of the Deceased, and the Defendants were precluded from praying in aid the Limitation Act.

[4] The facts as I find them are that the Deceased, the father of the parties, purchased by deed four properties: the two properties in dispute and two other properties which he has now disposed of. This deed was numbered 205/1950 and was dated 8th April 1950. In 1964 the Deceased by a deed of gift gave to the 1st Defendant one of his parcels of land at New Prospect, Barrow measuring two and a half lots of land. The 1st Defendant says she paid $500.00 for the land she got from the Deceased, but her deed of gift only mentions $25.00 and other good and valuable consideration. She built her house on that land. About 5 months before the Deceased took ill in October 1982, if the 1st Defendant is to be believed, or in early 1983 after the death, if the Plaintiff is to be believed, the 1st Defendant left her own house built by her on the portion of land at Barrow given to her by the Deceased, and went to live in the house of the Deceased on the larger parcel of land. With the permission of the Deceased she says, she cultivated different bits of the land, leaving the rest of it uncultivated. She recognized that her sister and the Plaintiff had an interest in the land under the intestacy of the Deceased. She has

other land that she cultivated as well as her portion of the larger parcel. Her cultivation of this part of the land of the Deceased is a minor part of her cultivation.

[5] Before the death of the Deceased, the 2nd Defendant lived in a chattel house on the 22 pole piece of land. The Deceased had also many years previously given her mother Olive Birch another piece of land, one acre and 20 poles in area. That land is presently cultivated by the 2nd Defendant, who is the only living child of Olive Birch. Olive Birch cannot work the land, being presently 81 years of age. The Deceased had permitted Olive Birch to put her chattel house on the 22 pole piece of land and the 2nd Defendant grew up with Olive Birch in that yard. The 2nd Defendant converted the old chattel house into a stone house in 1987. In about the year 1982 the 2nd Defendant began to cultivate with her father a small portion of the second larger parcel of land. She recognized that the Plaintiff had an interest in the larger parcel of land on the intestacy of the Deceased. I believe the Plaintiff that he was at that time with the approval of his father similarly cultivating a portion of this larger parcel of land, though the Defendants strenuously denied it. It was only when the will was produced about a month before the Deceased died that the Defendants fell out with the Plaintiff. I believe the Plaintiff that it was at that point that they began to quarrel with him. December 25th 1982 was the earliest that the Defendants could have commenced adverse possession against the Plaintiff, and this date would mean that the commencement of this action on 28th December 1993 was within 12 years and prevented the Limitation Act from extinguishing his right to the land. In any event, I find that neither the 1st nor the 2nd Defendant had the necessary *animus possidendi* of the entire larger parcel of land. By their own evidence neither has been in exclusive possession, nor has their possession of even a part been adverse to the Deceased prior to his death on 25th December 1982. Nor has their possession thereafter even

if adverse been of any identified portion or part of the land in question. The 2nd Defendant and her mother have lived on the 22 pole lot of land for some 30 years before the commencement of this suit. That possession was by way of the chattel house placed there with the permission of the Deceased. That possession was never adverse to the Deceased. It was not adverse to the Plaintiff until the death of the Deceased at the very earliest when she began to exclude the Plaintiff. Or it may have been in 1987, when she constructed the walled structure on the land. By this time, the 2nd Defendant well knew that the Deceased had given the parcel to the Plaintiff by the will, even though she questioned the validity of the will. She took a great risk in expending money 5 years later on building a walled house on the land allegedly devised to her brother by her father.

[6] The Deceased was elderly and a heavy drinker and became very ill in the month of October 1982. He went into hospital and died there on 25th December 1982. The Plaintiff subsequently probated a will allegedly in the handwriting of the Deceased. The will was in these words:

> General Hospital
> 27-11-82
>
> This my last will. I give all my land and house at Simon to me son Cornie Charles.
> (sd) Caesar Rogers
>
> Witnesses:
> (sd) Vincent Sprott
> 27/11/82
> (sd) FA Roberts
> 27/11/82

[7] The Plaintiff gave evidence about the circumstances surrounding the making of the will, and was cross-examined at length on these circumstances. The Defendants denied that the Deceased wrote the will. Their evidence and that of their witnesses was that the Deceased was unable to speak, move his limbs, feed himself, or instruct anyone to do anything from the time he became ill a few days before he entered Hospital until the day he died. The evidence of the Plaintiff was that the Deceased was at the time of making the will still able to speak and write and move about in bed. It was only shortly before he died that he became unable to speak or to move, he was not in that condition when he first went into the hospital. The Deceased had spoken to him on 27th November and told him he wished to make his will and asked him to get him paper to write the will. The Plaintiff got the paper for the Deceased and brought the witnesses from the street outside the Hospital to witness the will. He did not ask any of the nurses or doctors present in the Hospital to witness the will. The Deceased wrote out the will in his own handwriting and the witnesses witnessed it. It is common ground that the day after the will was made the Plaintiff informed the Defendants of the will and showed it to them. The Defendants objected to the will from the start, but took no steps to have the Deceased examined medically.

[8] The witnesses to the will were not called to give evidence. No medical witness gave evidence as to the illness of the Deceased or of the condition of the Deceased at the date of the making of the will. The Plaintiff gave only perfunctory evidence about the circumstances surrounding the making of the will. The position of the Plaintiff was that this was not a case concerning the validity of the will. This was a case concerning his sisters trespassing on the land given to him by the Deceased and to which he held a deed of assent. The will had been proved in common form after the Defendants had been given a chance to enter an appearance to the writ he had issued in 1983 to prove the will in

solemn form. The Defendants had not defended that writ, and he had proceeded to prove the will in common form. They could not raise the issue of the mental competence of the Deceased at the time he allegedly signed the will in a counterclaim to a trespass case. It was for the Defendants to have commenced a probate action and to have met the prerequisites for the bringing of a probate action. The Defendants on the other hand called Cyril Alexander, the elderly husband of the 2nd Defendant, and Cornelius Morgan, the 87 year old cousin of the Deceased, to buttress the evidence of the Defendants that the Deceased was unable to have written the alleged will.

[9] I find that the Plaintiff issued a writ in suit 167/83 and served it on the Defendants and another sister, which sister has now died and plays no further part in this action. By that suit 167/83 the Plaintiff claimed to be the sole devisee of the last will of 27th November 1982 of the Deceased, and to have the will proved in solemn form. He issued that writ because the Defendants were excluding him from the lands and disputing the will that he had been given by his father. The writ was issued by the Plaintiff to enable the Defendants to challenge the will of the Deceased. The Defendants did not enter an appearance to that writ. They apparently had lawyer problems. Nothing further happened on that case file, other than the filing by the Plaintiff of an Affidavit of Service. The suit was not withdrawn or proceeded with, it may still be on the books. On 13th February 1991 the Plaintiff applied instead to the Registrar for a grant of letters of administration with the will annexed. None of the documents accompanying the application, other than a photo-copy of the handwritten will, were before the court. The Grant numbered 12/1992 was made on 9th January 1992. On 11th August 1992 the Plaintiff gave the Defendants written notice to cease their cultivation of the land. On 10th December 1993 the Plaintiff executed a deed of assent numbered 7307/1993 in his favour of the 2 parcels of land in dispute. The Defendants did not comply

with his demand that they give up possession of the land to him. On 28th December 1993 the Plaintiff issued the writ in this case. After various interlocutory proceedings the defence and counterclaim was eventually filed on 19th January 1998.

[10] Because this is a case involving bitterly disputed family matters, it is difficult to determine which parts of the evidence of any witness is fabricated, which parts are merely mistaken, and which parts are unquestionably true. The case is further complicated because there is no agreement as to what the real issue is. The Plaintiff's position is that the matter is simply one of trespass to his lands. The Defendant's position is that this is really a probate action. Let us dispose first of the question whether this is a probate action. Order 53 of the **1971 Rules of the Supreme Court** governs probate proceedings. It provides *inter alia* at Rule 1(2) that a probate action means an action for the revocation of a grant of probate of a will or for a decree pronouncing for or against the validity of an alleged will. A probate action, by Rule 2(1), must be begun by writ. There are certain pre-conditions to the issue of a probate action. Rule 2(2) provides that the writ must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased. By Rule 2(3) a writ beginning an action for the revocation of the grant of probate or letters of administration of the estate shall not be issued unless a citation under rule 7 has been issued or the probate or letters of administration has been lodged in the Registry. By Rule 7, a citation may be issued on the application of the plaintiff requiring the person cited to bring into and leave at the Registry the probate or letters of administration. By Rule 8, such a citation must be issued out of the Registry and must be settled by the court. By Rule 9, unless the court otherwise directs, the plaintiff and every defendant must swear an affidavit concerning any testamentary script. By Rule 10, O.13 does not apply to a probate action, and the plaintiff upon filing of an affidavit of service may

proceed with the action as if the defendant had entered an appearance. If the defendant defaults, the plaintiff may set the matter down for trial. By Rule 11, the plaintiff must serve a statement of claim on every defendant who enters an appearance, or before the expiration of 8 days after the filing by him of an affidavit concerning the testamentary script. By Rule 13(3), any party to a probate action who pleads that at the time when the challenged will was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation that the will was not duly executed or that at the time the testator was not of sound mind, memory and understanding, shall be made by that party unless that plea was pleaded. By Rule 14, O.19 does not apply to a probate action and there cannot be a judgment in default; the plaintiff must, unless the court orders the action to be discontinued, apply to the court for leave to set down the action for trial. By Rule 15, O.21 does not apply to a probate action and on the application of the plaintiff at the time of the discontinuance, the court may order the grant of probate or letters of administration to be made to the person entitled thereto.

[11] From the rules described above, it is clear that a probate action must be begun by writ. There must be a citation to bring in the contested grant of probate. There must be affidavits of testamentary scripts. The failure of the Defendants to defend suit 167/83 did not stop the Plaintiff from proceeding to set the matter down and to proceed to trial or discontinuance. If he had done so, that would have been an end of the matter, and the Defendants could never question the will again. By abandoning the suit, and proceeding to apply to the Registrar for proof in common form, the Plaintiff left himself open to action by the Defendants who might have filed a caveat to prevent the grant or commenced a probate action at any time before or after he obtained the grant. The Defendants, however, did not issue a caveat or otherwise interfere with

the application of the Plaintiff. They did not commence a probate action. The Defendants waited until they were sued in trespass to raise their questions about the making of the will. They intended by their defence and counterclaim to turn these proceedings into a probate action. The Plaintiff submitted that this is an impossibility, that the Defendants have been deluded into believing that this is a probate action; that they have not understood that this is a simple trespass action. The Defendants have produced no authority for the probate action issue to be raised in the counterclaim. I find that the Defendants cannot at this stage raise by way of counterclaim in the trespass action questions that properly belong to a probate action commenced and conducted according to the rules laid down by O.53.

[12] The Defendants submit that even if they have commenced and conducted their probate action incorrectly by counterclaim in the Plaintiff's trespass action instead of by an O.53 probate action, the court has the power to apply O.2 r.1. This Rule states that where in beginning or purporting to begin any proceeding there has, by reason of anything done or left undone, been a failure to comply with the requirements of the rules as to time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings. The court is enjoined not to set aside any proceedings on the ground that the proceedings were required to be begun by an originating process other than the one employed. Rule 2 provides that an application to set aside for irregularity any proceeding shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step and such application must be made by summons or notice of motion. In this case, there is no application by the Plaintiff to set aside the proceedings brought by the Defendants. The Plaintiff merely claims that the proceedings are misconceived. No law has been shown to me to buttress the application of the Defendants that the court may treat this

failure to comply with O.53 as a mere irregularity. I am constrained to find the part of the counterclaim challenging the will a nullity.

[13] The Defendants raised by way of submission at the conclusion of the case the question of whether the Plaintiff was entitled to an injunction, given his laches and acquiescence in allowing the Defendants to repair and renovate their houses over the years before he commenced the action. The problem for the Defendants is that while these are perfectly valid defences, they have to be pleaded in the defence, and these defences were not so pleaded. At this stage of the proceedings the issues of laches and acquiescence do not arise for the consideration of the court.

[14] On the limitation issue the Defendants relied principally on 3 authorities: McClurg v. Rogers, Moore Claimant (1976) 27 WIR 60 which deals with the rights of a licensee with an equity; Mount Carmel Investment Ltd v. Peter Thurlow Ltd (1988) 3 All ER 129 which establishes that a letter sent by a Plaintiff's solicitor to a squatter does not confer possession on the true owner; and Buckinghamshire County Council v. Moran (1989) 2 All ER 225, which dealt with what acts of a trespasser amount to possession. The Plaintiff relied principally on the decision of the Court of Appeal in Pollard v. Dick (1991) OECS Law Reports 239. In this case, there is no question of the 2nd Defendant being either a tenant or a licencee with an equity. In any event, the pleadings in this case do not set up a claim by either of the Defendants to be a licencee with an equity. Their pleadings assert that they claim under the Limitation Act. Yet, from the evidence of the witnesses I find that neither of the Defendants was in exclusive and adverse possession of the larger of the two parcels of land at any time. The 2nd Defendant had no *animus possidendi* of the smaller parcel until after the death of her father on December 25th 1982 for the earliest if the evidence of the Defendants is believed.

[15] The Plaintiff gave evidence of the 1st Defendant having cut down various trees on the land of his father in early 1983. This was hotly denied by the 1st and 2nd Defendants. The Plaintiff claimed special damages of $4,410.00 for the trespass. He based this claim on a schedule of values of trees established by the Agricultural Department and apparently published in all police stations throughout the State. This Schedule has not been shown to the court, and it is not certain what exactly it says. There are at least two reasons why the Plaintiff cannot succeed in the claim for special damages even if I were to believe his evidence on this claim. First, in cases involving alleged damage to crops resulting in special damage strict proof of the alleged special damage is required. The alleged Schedule can never exempt a landowner from proving the value of the damage. This is best done by calling in a certified assessor who will give the usual notice to the alleged wrongdoer of his intention to visit the scene of the alleged damage and to count the damaged plants and to place a value on the damage, whether according to a Schedule of values or not. That valuation would be expected to be made promptly after the alleged damage, and to be put into writing and copied to the alleged wrongdoer. That was not done in this case. Secondly, the evidence of this independent witness, the licensed assessor, would be expected to be given to the court at the time of the trial. Where the evidence of the plaintiff is the only evidence of the trespass and of the value of the damage, both of which are hotly disputed by the defendant, it would be unsafe for the court to come to a finding against the defendant.

[16] The Defendants are not entitled to any of the reliefs claimed by them. The Plaintiff is entitled as against the 1st Defendant to an order that the 1st Defendant forthwith give up to the Plaintiff possession of the house of the Deceased which she presently occupies and which belongs to the Plaintiff. An injunction is granted to the Plaintiff restraining the 1st Defendant whether by herself her servants or agents or howsoever otherwise from

entering and or trespassing on the Plaintiff's lands or from cultivating crops on the Plaintiff's lands or doing or exercising any acts of ownership. The 1st Defendant shall have a period of 6 months to arrange to reap her crops and to move back into her own house.

[17] The Plaintiff is entitled as against the 2nd Defendant to an order that she forthwith demolish and remove the house erected on the Plaintiff's land. The Plaintiff shall have an injunction restraining the 2nd Defendant whether by herself her servants or agents or howsoever otherwise from entering or crossing and/or trespassing on the Plaintiff's land by erecting or constructing a building or any structure there and/or from remaining in occupation of any portion of the Plaintiff's lands and from doing or exercising any acts of ownership thereon. The 2nd Defendant shall have a period of 6 months to conclude arrangements either to pay her brother an agreed sum for the smaller parcel presently occupied by her and her mother or to remove her house and make arrangements to live elsewhere.

[18] The Plaintiff shall have his costs to be taxed if not agreed.

Ian Donaldson Mitchell, QC
High Court Judge