ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 129 OF 1999

BETWEEN:

JANNETTE MILLS

Plaintiff

and

GLENNIS MARLON MILLS
MAURITZ PATRICIA MILLS

Defendants

Appearances:

Samuel Commissiong for the Plaintiff
Paula David for the 1st Defendant
Arthur Williams for the 2nd Defendant

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2000: October, 5, 9, 10, 23, November 7, December 21
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JUDGMENT

[1] MITCHELL, J: This was an action for breach of trust brought by one sister against her other two sisters relating to the properties derived by them from their late father, George Volmar Mills (hereinafter "the deceased").

[2] By an action commenced in this suit on 19 March 1999, the Plaintiff sought orders for: setting aside an Order of the Court made in suit No 270/1996; an account of monies received by the Defendants in the estate of the deceased; an injunction restraining them from further dealing with the assets of the deceased; an injunction restraining them from selling the Frenches property or any other property of the deceased; and an order that the sale of the Frenches and Villa properties be set aside. By a Statement of Claim filed on 11 August 1999 the Plaintiff claimed that the three parties are sisters of the whole blood; that their

father died on 3 July 1977 having made his last Will and Testament dated 7 November 1995 whereby he had appointed Barclays Bank as his executor; that after his death Barclays Bank had renounced its right to probate; that on 18 October 1980 Letters of Administration with the Will Annexed had been granted to the Plaintiff and the 2nd Defendant; that at the time of his death the deceased had been the owner of properties at Prospect, Frenches and Villa; that he had devised those properties to his daughters for their lives and after their deaths to their heirs and assigns as trust property to be ultimately inherited by the children of the three sisters; that the deceased had intended that his grandchildren would be the ultimate beneficiaries of those three pieces of property; that the Defendants had made the First Application, a strange and unusual application, to the High Court in suit No 445/1989 which had never been brought to the attention of the Plaintiff and therefore that she was not bound by the Order made on 20 October 1989; that subsequently the Defendants had started the Second Application, a second strange and futile application, in High Court suit No 204/1996 for the sale of part of the Frenches property; that this application had been wholly unnecessary as both Defendants were tenants for life bound in law to preserve the property with a duty to rent it, maintain it, and preserve it, and to contact the Plaintiff if they intended to dispose of their life interest; that by a Third Application, which had been discontinued, they had asked the Court to permit them to sell the Frenches property and to divide the proceeds of sale among themselves; that by a Fourth Application in suit No 270/1996 brought by an originating summons under the Trustee Act, the two Defendants as life tenants had sought leave to sell the Prospect property and to divide the proceeds of sale between themselves as life tenants and among the beneficiaries in accordance with a valued appraisal; that the Plaintiff had never been made a party to those proceedings; that the Defendants had known that, like themselves, the Plaintiff had two children who were entitled to the remainder interests in the properties at Prospect, Frenches and Villa; that the said sale was not binding on the Plaintiff and was of no legal form or effect and ought to be set aside; that third parties who had purchased the said property had constructive notice of the terms of the Will; that the Defendants

had never been appointed Trustees of the Will of the Testator; that the 1st Defendant had never been one of the Administraces of the Estate; that the 1st Defendant had wrongfully sold the remainder interest of the Prospect property without the knowledge and notification of the children of the Plaintiff or of the Plaintiff herself; that the Defendants had wrongfully sold the lands at Prospect and Villa and had dishonestly appropriated the proceeds of sale to themselves and had never properly accounted to the Plaintiff for such proceeds; that the Defendants had acted in breach of trust in that they had ignored the testator's will in relation to the Villa and Prospect properties, had wrongfully valued and sold them without consulting the Plaintiff or her children, and had wrongfully spent substantial parts of the proceeds of sale and had not properly accounted; that the Defendants by their reckless conduct and dishonesty intended to continue to sell property that ought not to be sold and to convert the proceeds of sale to their personal use; and the Plaintiff claimed, damages for breach of trust, an order setting aside the Order made in suit No 27/1996, an account, an injunction, an order that the sale of the Villa and Prospect properties be set aside, and such other relief as to the Court might seem just.

[3] On 4 October 1999, the 1st Defendant filed her Defence, which was amended with leave on 25 April 2000. She claimed that by deed No 977 of 1977 the deceased had conveyed the Frenches property to the three sisters as tenants-in-common in equal shares; that by deed No 966 of 1977 he had conveyed the Villa property to the three sisters as tenants-in-common in equal shares; that the Order of the Court in suit No 445/1989 was a valid order merely declaratory of the interest of the Plaintiff, the Defendants, and their respective children under the Will; that the application in suit No 204/1996 relating to the sale of the "large" property at Frenches had been served on the Plaintiff and she had been fully aware of the application; that the Order in suit No 270/1996 was a valid order; that the Defendants as life tenants of the Prospect property were trustees of it and had properly sold the Prospect property pursuant to an Order of the Court of 6 July 1996; that the 1st Defendant had properly accounted to the Plaintiff with respect

to the proceeds of sale and had apportioned the proceeds of sale pursuant to an actuarial report; that the Defendants had not wrongfully sold the Villa land, the 1st Defendant had merely transferred her interest to the 2nd Defendant by deed No 3397 of 1998; that the 1st Defendant had not acted recklessly or dishonestly in her dealings with the several properties that were the subject matter of this suit but, on the contrary, had consistently sought the sanction of the Court in her dealings with them.

[4] By an Order of 22 September 2000, the 2nd Defendant served and filed her Defence late. Her Defence largely repeated the Defence of the 1st Defendant.

[5] The Facts. The only witnesses before the court in this case were the three parties who gave their evidence and were cross-examined by the other two counsel at length. A number of exhibits were put in evidence. The facts as I find them are as follows: The deceased father of the three parties died on 3 July 1977 leaving him surviving his widow Nina and six children, the three parties to this suit and their three brothers. The widow died on 29 August 1979. At his death, the deceased had left a Will dated 7 November 1975 and drafted by a Mr Nanton, a solicitor now deceased. At the time of his death, the three daughters had been living in Canada. The Plaintiff had then been about 22 years old and a college student, and the 1st Defendant about 17 years old still in school, while the 2nd Defendant had been about 34 years old and working to support the three of them in Canada. The deceased had been the proprietor of St Vincent's main funeral home, a building contractor, auctioneer, and furniture maker. His entrepreneurism had permitted him to accumulate some wealth, which he had invested in properties in St Vincent. His son Cedric had gone into the funeral business in competition with him, and Cedric, together with his two brothers, had been cut out of the Will with token bequests. The deceased had originally appointed Barclays Bank to be the Executor and Trustee of his Will, but Barclays Bank had renounced after his death in 1977. A Grant of Letters of Administration with the Will Annexed had been made to two of his three daughters, the Plaintiff and the 2nd Defendant, on 18

October 1980. There were three properties, among others mentioned in the Will, that were the cause of this family dispute. The first is known as the Frenches Land, the second the Villa Land, and the third the Prospect Land. Let us deal with them separately.

[6] The Frenches Land. At the time of the deceased's death this property consisted of two separate parcels. They were dealt with in two separate devises in his Will of 7 November 1975. The first parcel, known to the parties as the "small" property he devised in clause 5 to his wife Nina for the term of her natural life and after her death to the 1st Defendant for her life, and after her death to the children of the three parties to this suit as tenants-in-common. The devise read as follows:

> I give devise and bequeath my property situate at Frenches, Saint Vincent, which is bounded towards the North by lands of the heirs Arthur C Billinghurst towards the South by a Ravine towards the East by a Public Road and towards the West by others lands belonging to me and [sic] to my wife Nina Vermina for the term of her natural life and after her death to my daughter Glennis Marlon Mills for her life and thereafter to her heirs and those of her sisters as tenants-in-common.

This devise consisted of two consecutive life interests with the remainder to the "heirs" of the three parties in this case. The widow having died in 1979, the 1st Defendant was at the time of the trial the present life tenant of this "small" property at Frenches. Clause 5 was, as we shall see later, the subject of interpretation by the High Court in an earlier action, suit No 445/1989.

[7] The second parcel of Frenches land is known to the parties as the "large" property. This the testator described in his Will as his dwelling-house and business place at Frenches. This "large" property he devised in clause 6 of his Will to his Trustee for the three daughters, the parties to this action, for their lives and after their deaths to their "heirs" as tenants-in-common. The devise read as follows:

> I give devise and bequeath by [sic] dwelling-house and business place at Frenches aforesaid unto the Bank upon trust for Mauritz Patricia Theresa Mills Jannette Gail Mills and Glennis Marlon Mills for the term of their natural life [sic] and after their death [sic] to their respective heirs and those of her [sic] sisters as tenants-in-common.

As we will see below, he had shortly before he died conveyed the fee simple absolute in this "large" property to his three daughters as tenants-in-common. After the death of the deceased, this "large" property was for some years rented out to various tenants, and the rents were paid into the joint account. The brother Cedric is now with the consent of his sisters paying rent and is occupying the house and conducting his funeral parlour business from the premises.

[8] At the date of the death of the deceased, this "large" property of Frenches land had become the subject of a registered deed of conveyance No 977 of 1977. The deceased had executed this deed in favour of his three daughters as tenants-in-common shortly before his death. The deed recited an alleged purchase by the three daughters. The evidence is that there had in fact been no purchase, and that this was a gift to them from their father. The operative words of the deed are as follows:

> NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of thirty thousand dollars ($30,000.00) by the PURCHASERS paid to the VENDOR on or before the execution of these presents (the receipt whereof the VENDOR doth hereby acknowledge) the VENDOR doth hereby GRANT AND CONVEY ALL AND SINGULAR the said hereditaments and ALL THE ESTATE right title interest claim and demand of the VENDOR in to or upon the said hereditaments and every part thereof UNTO AND TO THE USE of the PURCHASERS their heirs and assigns FOREVER . . .

There was no mention in this deed of the settlement previously provided for in clause 6 of the Will of the deceased of 7 November 1975. By this deed, the fee simple absolute in the "large" property had been conveyed by the deceased to the three parties without any qualification. The "purchasers" were at the time of the execution of this deed by the deceased and its subsequent registration in the Registry of Deeds of St Vincent resident in Canada, and they did not execute the deed, though they are named as parties to the deed.

[9] The "purchasers" remained unaware of the existence of the deed No 977 of 1977 dealing with the "large" property at Frenches until some years after it had been executed. The Plaintiff testified that she had always considered that this property continued to be the subject of the settlement in her father's Will, despite the words in the deed. The claim of the Plaintiff is that this conveyance, and others like it made in the month before the deceased's death and relating to lands devised in the Will, was made with the intention of minimising death duties, and that the property was transferred by the deceased to his three daughters *inter vivos* on a secret trust, and was accepted by the parties on the understanding that it was not beneficially owned by the 3 sisters but were subject to the trusts in the Will. The Defendants testified that they considered that this property belonged to the three sisters' absolutely. The Defendants denied in their pleadings and in their testimony the claim of the Plaintiff that the trusts in the Will applied to this property. Confusion over the interpretation of the Will of the deceased resulted in the years prior to this action in the five suits 445/1989, 530/1989, 183/1996, 204/1996, and 270/1996, which suits are dealt with below.

[10] The Villa Land. This property consisted at the time of the death of the deceased of a house and land. This property is also sometimes called the Indian Bay property. The testator devised the Villa Land in clause 8 of his Will to his Trustee in trust for the three parties for their lives and after their deaths to their heirs in equal shares. The devise read as follows:

> I give devise and bequeath all my lands and house at Villa in the State of St Vincent to the Bank in trust for my three daughters Patricia Theresa Mills, Jannette Gail Mills and Glennis Marlon Mills for their lifetime [sic] and after their death [sic] to their respective heirs and those of their sisters in equal shares.

Before his death on 3 July 1977, the deceased dealt by a deed as described below in the title to this property in a similar fashion to that in which he had dealt with the "large" property at Frenches. This has resulted in one of the major disputes in this case.

[11] On 2nd June 1977, during his final illness, the deceased, allegedly in consideration of the sum of $40,000.00 paid to him by his three daughters, executed a deed of conveyance No 967 of 1977 in their favour for them to hold the Villa Land as tenants-in-common in equal shares. In spite of the recital of a sale, the uncontested evidence is that this was not a purchase and sale, and that this transaction was in reality a voluntary transfer. The operative words of this deed are:

> . . . the VENDOR doth hereby GRANT AND CONVEY ALL AND SINGULAR the said hereditaments and ALL THE ESTATE right title interest claim and demand of the VENDOR in to or upon the said hereditaments and every part thereof UNTO AND TO THE USE of the PURCHASERS their heirs and assigns FOREVER . . .

The Plaintiff claims that this conveyance to the three daughters was not a gift for their benefit but was on the trusts in the Will. Counsel for the Plaintiff suggested to the Defendants that, as with the Frenches Land, there was a secret trust at the time of this conveyance, that the conveyance on 2 June 1977 by deed No 967 of 1977 had been only a device to avoid death duties, and that the Villa Land was

always known by them to be intended by the deceased to be held by the three sisters on the trusts in the Will. The Defendants denied that they had agreed to take title to the properties on trust or that they were bound by a trust as to the Villa Land. As with the previous 1977 deed, this one was executed solely by the "Vendor" and not by the "Purchasers."

[12] Both Defendants denied in evidence that there was any secret trust or other trust of the Villa Land. They denied that the Villa Land remained held by the sisters in trust for the grandchildren as mentioned in the Will. The Defendants testified that they considered that this property had been taken out of the Will by their father and vested in the three sisters absolutely. The Plaintiff on the other hand appeared in her testimony to consider the Villa Land to be trust property held on the secret trust earlier referred to. She also agreed in cross examination that the Villa Land was owned by the three sisters "absolutely", but I was not sure that she understood the legal meaning of this term of art. The three sisters at first occasionally occupied the Villa property, and sometimes it was rented and the rents paid into the joint account. The 2nd Defendant has now occupied it as her home for many years since the death of the testator. She has now bought out the interest of the 1st Defendant in the Villa property for the sum of $165,000.00. The 2nd Defendant's position is that she owns a 2/3 interest in the Villa property and the Plaintiff holds the remaining 1/3 interest in it. The Plaintiff's contention is that the property is held by the three sisters as constructive secret trustees on the trusts in the Will. The Plaintiff seeks to set aside the sale and transfer of the 1st Defendant's alleged interest and to restrain the Defendants in further dealing in the assets of the estate contrary to the trusts to retain the properties for the ultimate benefit of the grandchildren of the deceased.

[13] The Prospect Land. At the time of the death of the deceased, this land consisted of two properties, a small wooden building on a wall foundation, the wooden building having been constructed from used materials, and another larger concrete 4 bedroom house. By clause 10 his Will, the deceased described the Prospect

Land as the Gittens property. He devised it to the two Defendants for their lives and after their deaths to the heirs and assigns of the Plaintiff and the two Defendants as tenants-in-common forever. Clause 10 of the Will was in the following terms:

> I give devise and bequeath my property at Prospect known as the Giittens property to my two daughters Mauritz Patricia Theresa Mills and Glennis Marlon Mills for the terms of their natural lives and after their death [sic] to their respective heirs and assigns and those of her [sic] sisters as tenants-in-common for ever.

Unlike the "large" property on the Frenches Land and the Villa Land, the Prospect Land was never devised by the deceased to his Trustee subject to any trust of his Will. This was, nevertheless, the only property that the 1st Defendant in her testimony in chief considered was subject to the trusts of the Will.

[14] After the death of the deceased, the 2nd Defendant furnished the small house and rented it to a Mr Providence. The larger house was not rented out until about 1980 when it was rented out to a Mr Snagg. A joint account was opened at a bank and the rent paid into this account. Various rents were received over the following 20 years from various tenants for one property or the other. These rents were paid into various bank accounts in the names of various of the three sisters and were used to pay insurance premiums, taxes, maintenance expenses, other expenses, and any balance distributed between the parties. Due to a lack or resources, the small property became uninhabitable and was vandalized and destroyed years ago. There is no real dispute between the parties over the handling of those rents that were received, though there is no evidence of any accounts of any kind ever having been kept by any one of the parties relating to any monies ever received by them in relation to the rental income of the various properties. The Plaintiff made it clear that she did not charge the two Defendants with any particular dishonesty in their dealings with the money derived from the properties inherited from the

deceased, what she was particularly complaining about was the apparent determination of the Defendants to partition the properties amongst themselves and to sell them to strangers contrary to the wishes of their late father, the deceased in this case.

[15] On Barclays Bank having declined to take up the executorship and trusteeship conferred upon it by the deceased, the 2nd Defendant and the Plaintiff as two of the residuary legatees and devisees under the Will had applied for and been granted Letters of Administration with the Will Annexed. In the Declaration on Oath of the Value of the Estate copied in the Grant they recited a Ratho Mill Land and building, valued at $31,242.00, the Prospect Land and buildings which they valued at $50,785.00, and the Richmond Hill Land and building. The Ratho Mill Land and building had been devised in the Will to the Plaintiff for her own use absolutely and has never been alleged to be subject to any trust and is not in dispute in this case. The land and building at Richmond Hill, which is the same place as Frenches, described in the Grant is clearly not the "large" property at Frenches as it was valued only at $5,000.00. It must be the "small" property at Frenches. The significance of this detail is that, at least by 1980, the Plaintiff and the 2nd Defendant were holding out that the "large" property of Frenches Land and the Villa Land, both which had been conveyed by the deceased to his three daughters by the two deeds of 1977, were not in fact still parts of the Estate of the deceased. We must conclude that the Plaintiff and the 2nd Defendant, at the time of their application for the Grant, were of the view that these two properties did not form part of the deceased's estate. That is why they did not mention them on their Declaration of Oath of the Value of the Estate, nor did they pay death duties on those properties. The only way that the Plaintiff can succeed in her claim that the Defendants hold the properties in dispute in trust is if she can convince the Court that, as she claims, they held the freehold that had been vested in them by the various conveyances in evidence in this case on a constructive secret trust.

[16] After the 2nd Defendant and the Plaintiff had received the Grant of Letters of Administration with the Will Annexed on 18 October 1980, they proceeded to deal in the Prospect land. The Plaintiff and the 2nd Defendant executed a deed of assent in favour of the two Defendants dated 2nd December 1981 and registered as deed No 23 of 1982. In this deed, they erroneously recited that the deceased had devised the property to "the Beneficiaries and their respective heirs and assigns as tenants-in-common for ever," and they proceeded to vest the fee simple absolute in the two Defendants by the following words:

> . . . DO HEREBY GRANT AND CONVEY unto the Beneficiaries [the 2 Defendants] their respective heirs executors administrators and assigns ALL and SINGULAR the said hereditaments and ALL the estate right title interest claim and demand of the Testator and the Administrators to and upon the said hereditaments and every part thereof TO have and To Hold the same Unto and To the use of the Beneficiaries [the 2 Defendants] for ever . . .

The testator had in fact in his Will devised to the two Defendants merely a life interest in the Prospect Land, with the remainder over to the "heirs and assigns" of the Plaintiff and the two Defendants. This deed of assent, No 23 of 1982, had been prepared by Messrs Hughes & Cummings who were then acting as solicitors for the Administrators. The deed was clearly in error as to the interest that it claimed had been devised in the Will of the Testator. The error is understandable in that the deed of assent may have been prepared based on the use of the phrase "heirs and assigns" by the deceased, which phrase in such devises normally signifies a devise of the freehold to the devisee. However, the use of the other contradictory phrase "for the terms of their natural lives and after their deaths" should have suggested that perhaps the deceased meant to devise only a life interest to the Defendants. The parties appear to have soon realised that this deed was in error. The evidence is that one consequence of this deed of 1982 was that the Defendants had from then on dealt with the Prospect Land as if it had

been assigned to them by the Administrators, despite the error in describing their interest. The evidence is that they knew that there was an error in the deed, and they acknowledged that the grandchildren had a residuary interest, but they considered that the Plaintiff and the 2nd Defendant had transferred the legal interest to them, and that the Plaintiff no longer had any legal or other interest in it. They appeared to have been unsure about the grandchildren's remainder interest. The result was suit No 445/1989 dealt with below.

[17] In 1996 a further complication arose over the Prospect Land. It was discovered by the two Defendants that a part of the Prospect Land occupied by their father and considered by them to have been devised in his Will had not been included in his title deed. The evidence is not clear whether there was an error in the drafting of his deed, or whether he had purchased adjacent land but had never obtained a deed for it, or whether he had been squatting on additional land, or whatever other reason there was for him not having a deed for the omitted land. The two Defendants' deed of assent, as a result, did not include this omitted land, and it followed that they had difficulty in dealing with its title. The solution they chose was to proceed to register in their names in the Registry of Deeds a possessory title No 3334 of 1996 and dated 15 August 1996 and prepared by Messrs Cato & Cato. In this document, they claimed that their father had occupied the omitted land since 1971, and that the two of them had occupied the same land exclusively since the date of the death of their father in 1977. The purpose of this otherwise extraordinary transaction by which the two defendants acquired a squatter's title to part of the Prospect Land was not pursued or developed in cross-examination. It appears that this action of the two Defendants was not intended to and did not have the effect of defrauding the Plaintiff or the estate. The intention of the Defendants appears only to have been to create a paper title to the omitted part of the Prospect Land in order to permit the Defendants to deal in its entirety with the Prospect Land, all of which was considered by all three parties to have been intended by the deceased to have been included in clause 10 of his Will. It would appear, and I so find, though as the Defendants have now sold the Prospect Land

the matter is moot, that in spite of the words in deed No 3334 of 1996 the Defendants held title to all of the Prospect Land as life tenants pursuant to the Will of the deceased.

[18] The Law Suits. In the year 1989, by suit No 445/1989 the two Defendants applied to the High Court pursuant to Order 63, rule 2(2)(b) of the Rules of the Supreme Court for an interpretation of clauses 5 and 10 of the Will. This is the suit described by the Plaintiff in her Statement of Claim as the "First Application." Clause 5 of the Will dealt with the "small" property on the Frenches Land while clause 10 dealt with the Prospect Land. At paragraph 7 of their affidavit in support of their application in suit No 445/1989, the Defendants mentioned the deed registered as deed No 23 of 1982 by which Plaintiff and the 2nd Defendant as Administrators had erroneously vested the fee simple absolute in the Prospect land in them. One effect of this application would have been to obtain an interpretation of the meaning of deed No 23 of 1982. Though the Plaintiff claimed in her Statement of Claim that this application was wholly unnecessary and pointless, it was plainly necessary to clear up the confusion caused by the Plaintiff's own erroneous assent of the fee simple absolute in the property to the Defendants in deed No 23 of 1982. Singh J, as he then was, by an Order made on 20 October and perfected by filing on 8 November 1989, interpreted clause 5 of the Will as meaning that the "small" property at the Frenches Land was held by the 1st Defendant for her life and after her death that it went to the children of the three sisters as tenants-in-common. Though the application had originally been made for the interpretation of both clause 5 and clause 10, the Order as made by Singh J related only to the interpretation of clause 5, and the Prospect Land was not dealt with in the Order.

[19] The two Defendants subsequently, in proceedings that were aborted, applied by Originating Summons to the High Court in suit No 530/1989 for a variation of the terms of "the trust" by authorising them to sell the Prospect Land and to divide the proceeds of sale in 3 parts. That action was strictly in time the second application

made by the Defendants, but the Plaintiff does not mention it in her Statement of Claim. The two Defendants described themselves in the title of suit No 530/1989 as "trustees". In the title of the action, they prayed in aid the Trustee Act, Cap 101, sections 11, 21 and 30. Nowhere do they give any explanation as to how the 1st Defendant in particular became a trustee. Nor do they explain how the Prospect Land came to be trust property. The judgment of Singh J in the earlier suit No 445/1989 had not dealt with the Prospect Land, and it certainly had not interpreted it as being subject to a trust. Nor did the Defendants in suit No 530/1989 ask for a declaration as to the effect of the erroneous deed No 23 of 1982 that had vested the fee simple absolute in the Prospect Land in them. The court was asked to permit the 1st Defendant together with a co-trustee to manage one third of the proceeds of sale of the Prospect Land for herself for the term of her life and after her death for her heirs and assigns; for the 2nd Defendant, together with a co-trustee, to manage another one third in similar terms; and for the two Defendants to manage the final third for the term of their lives and after their deaths to the heirs of the Plaintiff in equal shares; to permit either one of the life tenants to buy out the other life tenant and their and the Plaintiff's children; and to permit the purchasing trustee to have power of selling, mortgaging, etc.

[20] Suit No 530/1989 was not proceeded with, and appears to have lapsed. Nothing came of it, and there is no remedy sought in relation to it by the Plaintiff other than a general protest that these actions were in fraud of the secret or constructive trust under which the Defendants held the Prospect Land.

[21] By a writ of summons issued on 17 May 1996 and numbered suit No 183/1996 and prepared and filed by Mrs Cato, the two Defendants brought a third action in the High Court. This writ was issued against the Plaintiff in this suit. This is what the Plaintiff calls the "Third Application." It sought the partition and sale of the "large" property of Frenches Land and the distribution of the proceeds of sale amongst the tenants-in-common. It recited the deed No 977 of 1977. The Plaintiff complained in her Statement of Claim and testified to the effect that the

proceedings had never been served on her. The proceedings must have been served on her, however, as on 31 May 1996 Mr Samuel Commissiong acting as her solicitor filed a summons supported by an affidavit protesting that the writ had been issued and served without leave. He sought an order that the writ be set aside on the basis that it had been issued against the Plaintiff who resided in the USA without the requisite leave of the Court. He was, for some unspecified reason, but perhaps related to the fact that the action had been discontinued on 25 June 1996, on 28 June 1996 granted leave by Cenac J to withdraw his summons. This application having been discontinued, no remedy is sought by the Plaintiff concerning it and there is no need to refer to it again.

[22] On the same 25 June 1996, by suit No 204/1996 the two Defendants brought a fourth action in the High Court. This was a further action against the Plaintiff relating to the "large" property of Frenches Land. The writ was issued pursuant to leave granted on 24 June 1996 for it to be served by Federal Express at the Plaintiff's address in Florida. This is what the Plaintiff refers to as the "Second Application". In the statement of claim in suit No 204/1996, the Defendants claimed that the 3 parties were tenants-in-common of the "large" property at Frenches, reciting deed No 977 of 1977, which had vested it in them as such. They sought an order for the sale of the property and division of the proceeds of sale in 3 shares.

[23] The Plaintiff claimed in her Statement of Claim in the present action, and testified to that effect, that she had never been served with these proceedings in suit No 204/1996. The Plaintiff must have been served with the proceedings, though she vehemently denied it, as on 25 July 1996 an appearance was entered in the action on her behalf by her solicitors, Messrs Commissiong & Commissiong. No defence was filed by the Plaintiff, and on 23 September 1996 the Defendants applied by Motion for final judgment. The Motion was served on the Plaintiff's solicitors on 24 September 1996, and at the hearing on 5 December 1996 the Plaintiff was represented by counsel.

[24] Cenac J duly ordered that the "large" property at the Frenches Land be sold; and that before it was sold the Registrar of the High Court was to carry out an inquiry as to who were the persons interested in the property and for what interest; and after the inquiry had been held the Defendants were to be permitted to apply in Chambers for further directions as to the carrying out of the sale. Up to the time of the hearing of this suit, the Registrar had not yet held the enquiry ordered by Cenac J, and the "large" property at the Frenches Land remains unsold. No question of any trust arose on the pleadings in those proceedings, and the Order made did not constitute the Defendants trustees of the property. This order is one of the principal contentions in this suit.

[25] On 12 July 1996 the two Defendants commenced their fifth application in the High Court, taking out an originating summons in suit No 270/1996. This is what the Plaintiff referred to in her Statement of Claim as the "Fourth Application." This application was ex parte the Plaintiff who was not joined as a party nor served with the proceedings. By this suit, the Defendants described themselves as, "the present life tenants and trustees of the property described in deed of assent No 23 of 1982", i.e., the Prospect Land. They did not seek an interpretation of the effect of the deed which had erroneously vested the fee simple absolute in them. They sought an order of the court that they might sell all or part of the property "held by them as such life tenants and upon trust for sale;" and that the proceeds of sale be divided as between the life tenants and the "beneficiaries." By the affidavit in support, the Defendants apprised the court of the Will, and of the deed of assent No 23 of 1982, though they failed to mention that the deed was in error. The affidavit apprised the Court of the various children of the sisters, of the buildings having fallen into disrepair, and of the "life tenants" being in no position to repair the property. It would appear from this application that the two Defendants had acknowledged that the deed by which the Plaintiff and the 2nd Defendant had vested the Prospect Land in the 3 parties absolutely was defective, and they were not relying on it as to their beneficial interest in the Prospect Land. They do not in

their affidavit in support of the application in suit No 270/1996 refer the court to the Order previously made in suit No 445/1989 by Singh J. The omission may be due to the fact that though the application in suit No 445/1989 related in part to the Prospect Land, the Order in that suit did not deal with the Prospect Land.

[26] On 16 July 1996, Cenac J granted the Order applied for in suit No 270/1996. He ordered the sale of the Prospect property "described in deed of assent No 23 of 1982." His Order recited that the property was held by the applicants as "present life tenants and trustees of the property." His order recited that the Prospect Land was "property held by them as such life tenants and upon trust for sale for beneficiaries referred to in the Will of George Mills, both applicants consenting to the said sale." He ordered that the proceeds of sale be divided as between the life tenants and the beneficiaries in accordance with a valued appraisal. He ordered that the trustees invest the sums due to the beneficiaries either in other real estate, bank deposits, or other suitable investments as in their discretion they shall think fit. Finally, he ordered that the sale may be by private treaty, and that provision be made for the costs of the application.

[27] The Correspondence. There is in evidence a series of correspondence between the parties' solicitors referring to negotiations between the parties for the sale of the Prospect Land prior to the above suit No 270/1996. Some of the contents of this correspondence have to do with the Villa Land and the Frenches Land. The correspondence from the years 1993 and 1994 reveals that the parties were discussing amongst themselves the severance and partition of the properties held by them as tenants-in-common. The 2nd Defendant wanted to buy the interests of her two sisters in the Villa property which she had been occupying as her home for many years. The 1st Defendant wanted to acquire the entirety of the "small" property at Frenches that she had been holding as life tenant and had been occupying as her home. The Defendants proposed to transfer the Prospect property to the Plaintiff. The Defendants proposed that all the properties be valued and, to achieve equity, that sums of money would pass to "equalize the

shares." The Plaintiff eventually appears to have decided not to proceed along those lines. She took the advice of her aunt, Mrs Cato, and retained her own solicitor.

[28] The correspondence of 1995 has the Plaintiff's solicitor proposing on her behalf to purchase the interest of both the Defendants in all three of the properties. All this while the Plaintiff lived in the USA, raising her family and practicing medicine there, while the two Defendants lived in two of the properties in which they had made their homes while they worked and raised their families in St Vincent. The Plaintiff's explanation for this otherwise extraordinary proposal of hers is that she considered that the three sisters held the properties in trust for the grandchildren of the deceased. Her only desire, she claimed, was to retain the properties for the benefit of the grandchildren. She would not want the two Defendants to sever the interests and partition the properties in the way the Defendants proposed because that would allow the individually owned properties to be sold and disposed of out of the family contrary to the wishes of her father. She appeared not to appreciate that if the parties proceeded as she proposed, and she purchased the interests of the two Defendants in all of the properties, they would be severing the co-ownership life interests, and she would then be free herself to dispose of any or all of the properties out of the family. She did not seem to realise how difficult it would be for her sisters to agree to be deprived of their longstanding homes. In any event, there is no evidence that she made any real effort to purchase the Defendants' interests. She only threw it out as a suggestion.

[29] By the year 1996, the correspondence reveals that the Defendants had ceased negotiations with the Plaintiff and taken matters into their own hands. They had the Prospect Land and the "large" property at Frenches valued. The Plaintiff continued during this year to suggest in a desultory fashion that she should buy out their interests in the Villa and Frenches properties. By the year 1997, the evidence discloses that the Defendants had commenced steps to sell the Prospect Land, which had been vested in them. By this stage, 20 years after the death of

the deceased, the evidence is that the burden of maintaining and managing the various properties, with their limited resources and with little or no assistance or involvement by their sister the Plaintiff, had grown too much for them. The Defendants proceeded to obtain the Order of Cenac J in suit No 204/1996 for the sale of the "large" property at Frenches, but the Plaintiff has successfully stymied the carrying out of that Order, and that property is presently deteriorating rapidly with only a part of it able to be used.

[30] By the year 1997, the Plaintiff's solicitors were writing letters to the Defendants' solicitors raising doubts as to whether the Frenches or Prospect properties could be sold on the ground that the sisters' children were the ultimate beneficiaries. This is the first time that the Plaintiff begins to suggest that there was a legal obstacle to the severance and partition of the various properties that the parties had been discussing over the previous several years. The Defendants do not appear to have understood these doubts raised by the Plaintiff's solicitor as indicating that they were bound by a secret constructive trust to the settlements in the Will, and therefore incapable in law of dealing in the properties in question. At any rate, no response appears to have been made by the Defendants to the doubts raised by the solicitor for the Plaintiff.

[31] The next step in the correspondence is that by a letter of 14 July 1998, presumably pursuant to the Order of Cenac J, the Defendants acting through their then solicitor Mr Ronald Jack retained one Judith Veira, an actuary of Nunez-Veira Caribbean Pension Consultants of Kingstown, to ascertain the amount of money to which each beneficiary was entitled from the proceeds of sale of the land of an unnamed testator. The net proceeds of the sale of this unidentified property, the actuary was informed, was $276,242.71. From this, we can deduce that the Prospect Lands had been sold, though there was little evidence concerning the sale before the court.

[32] By a report dated 26 July 1998, the actuary reported back to Mr Jack on two formulae that she had worked out in her report. On the first approach that she suggested, the two life tenants were entitled to $244,354.19, while the grandchildren would be entitled to the balance of $31,888.52 to be divided equally among them. On the second approach, the two life tenants would be entitled to $246,016.62 and the grand children to $30,226.09.

[33] The next letter is dated 26 April 1997 and was from the Plaintiff's solicitor, Mr Commissiong, to Mr Jack. The Plaintiff's solicitor referred to a court order that he claimed had been agreed on, but that had not been filed, by which the Plaintiff had been given the right of first refusal to purchase the family lands (but about which no further evidence was given at the trial). He also claimed that it had been agreed that none of the properties might be sold off until directions had been given by the court. He next referred to an advertisement of the family lands for sale which act the Plaintiff considered hostile. He reminded Mr Jack that the parties had obtained valuations which were to be used to obtain an average price. He next raised doubts whether or not the Frenches Land or the Prospect Land could be sold, as the sisters' children were the ultimate beneficiaries of the Prospect Land and the "small" property on the Frenches Land, and the land could not be sold without a proper order of the court, with the knowledge of all interested parties, and a strong case having been made out; finally he came to what he called the critical issue, viz, that the Plaintiff had discovered that the Prospect Land had been sold in defiance of the Will and the right of the Plaintiff's children for a purchase price of $62,000.00 without any accounting having been made to the Plaintiff. This letter does not suggest that the Plaintiff was of the view that the lands were bound by the law relating in St Vincent to settlements. No response from Mr Jack to this letter of Mr Commissiong, if any, was put in evidence.

[34] On 13 August 1998, Mr Jack instead blithely sent a copy of the actuary's report to Mr Commissiong together with a copy of his earlier letter of instruction to her. Mr Jack's letter revealed that the Defendants intended to distribute the proceeds of

sale in accordance with the first approach suggested by the actuary, as it was less favourable to them. By letter of 13 August 1998, Mr Commissiong responded that his client neither understood nor appreciated the contents of his letter of 13 August, and reminded him that his clients already had due notice of where the matter would lead.

[35] On 2 February 1999, the 1st Defendant sent a Memo to the Plaintiff concerning repairs and maintenance to the "small" property on the Frenches Land. From the evidence, it appears that this Memo was sent to the 2nd Defendant as well. This is one of the few instances of any one of the three sisters attempting to reduce to writing any of the expenses incurred by them in the management of these properties.

[36] On 3 June 1999, two months after she had entered an appearance to this action on 31 March 1999, the 1st Defendant sent Bank Drafts to the Plaintiff and the 2nd Defendant as being the shares due to their children from the proceeds of sale of the Prospect property. The 1st Defendant's letter claimed that these amounts had been calculated by her on the basis on the actuary's report referred to at paragraph [32] above. Those cheques were never cashed by the Plaintiff or by the 2nd Defendant. The Plaintiff's stated reason in her testimony for not cashing the cheques relating to her children's interests is that she disputes that the Defendants ever had any right to sell the property, which she considers that was settled land that was incapable of sale, even by an order of the court. The 2nd Defendant's stated reason for not cashing her children's cheques is that she disputed the amount sent to her by the 1st Defendant. During the trial, it emerged that the 1st Defendant had used some of the proceeds of sale of the Prospect Land in the period between the sale of the Prospect Land and the distribution that she subsequently made. She and the 2nd Defendant were signatories to the account in which the funds were lodged. The 1st Defendant was the prime mover in the sale of the Prospect Land. The evidence is that the 2nd Defendant also had advances made to her by the 1st Defendant prior to the final distribution. There is

no satisfactory evidence that any of these advances was fraudulent or improper, and I make no finding as regards them.

[37] On 7 June 1999, the 1st Defendant had sent the 2nd Defendant a cheque for EC$2,317.14 as the balance of her share of the sale of the Prospect property. She did not pay the 2nd Defendant the amount of her share in full as the actuary had calculated in her report. Apparently, the 1st Defendant considered that the 2nd Defendant owed the 1st Defendant and the Plaintiff an amount of rent or compensation in lieu of rent for the 15 years that the 2nd Defendant had enjoyed the occupation of the Villa property. She considered that the three sisters had an interest in the Villa property and a right to be compensated for the use of it by the 2nd Defendant. She took the opportunity to correct this inequity, as she saw it, by debiting an amount of compensation from the 2nd Defendant's share of the proceeds and paying it to herself. This action of debiting the amount of money due to the 2nd Defendant was not the result of any discussion, far less an agreement, that she had with the 2nd Defendant. She worked out for herself the amount of monthly rent or compensation that she felt should have been payable by the 2nd Defendant for the 2nd Defendant's use of the Villa property and deducted her own share of it from the monies that she held for the 2nd Defendant from the sale of the Prospect Land. She presumably left the Plaintiff to take her own remedies to collect the amount of "compensation" that the Plaintiff might consider was due to her from the 2nd Defendant. The balance of $2,317.14 as calculated by the 1st Defendant was the amount that she remitted to the 2nd Defendant. It is from this letter that we learn that the Prospect Land had been sold in 3 lots, one to Leon Williams for $57,760.00, and the other two to Delroy and Veneta McBarnett for $176,490.00 and $58,510.00 respectively. The 2nd Defendant did not as mentioned above accept the bank drafts that were sent to her by the 1st Defendant either as her children's share or as her share as she considered that the 1st Defendant had no right to make the deductions that she had made.

[38] Settlements. It is appropriate here to deal with the present state of the law of St Vincent and the Grenadines as to settlements of land. It is the contention of the Plaintiff that all three parcels of land in dispute are settled land, and that the conveyances by the deceased of the freehold to his daughters before he died were designed to vest the fee simple in the relevant daughters on the same trusts as Barclays Bank would have held them if title to them had passed under the Will. The law as to settlements in St Vincent is shrouded in antiquity. It is fitting to observe at the outset that the people of St Vincent and the Grenadines are not well served by the antiquated system of law relating to land as it is found in this State. The law in St Vincent regarding settlements affecting land is still based on the long ago repealed law of England, which existed in that country prior to the statutory reforms of the 1850s. One consequence of this is that only the introductory paragraphs of the leading textbooks on the law of settlements used by English practitioners give any guidance as to the law on settlements as it currently is in St Vincent. A settlement is ideally suited where the inclination of a fee simple owner is deeply rooted in anxiety and distrust. The classic creation of a settlement occurred when the settlor retained the benefit of ownership in himself for his life but withheld the entire ownership of the fee simple from his descendants for as long as possible by reducing them to the position of mere limited owners. Such a limited owner was unable to dispose of the ownership of any land that was subject to the settlement. By a process of settlement and resettlement the land would remain in the family indefinitely. This process of settlement and resettlement, it was long ago realised, resulted in a loss of revenue to the Crown as a result of the inability of the owners to sell any part of the settled land, thus producing no stamp duties and taxes. That is why the Statute of Uses was introduced by the English parliament in 1535. That statute executed the uses, for it held the feofee to uses as the owner of the land, and permitted the Crown to demand feudal taxes from him. The Statute of Uses is still one of the principal conveyancing Acts in St Vincent and the Grenadines. It is specifically preserved by the Second Schedule of the Application of English Law Act, Cap. 8, of the 1991 edition of the Laws of St Vincent and the Grenadines. It had not been not long before the lawyers of the

16th and subsequent centuries in England found ways of neutralizing the statute, thereby restoring the old form of settlement. Unless the settlement so provides, land subject to a settlement in St Vincent and the Grenadines can never be sold, leased or mortgaged, however desirable that may be. In the absence of a power of sale, exchange, lease, or partition in the settlement the only means of doing justice to the land is to apply for a private Act of Parliament authorising the trustees or tenant for life to take the appropriate action. The most serious disadvantage of these settlements was that they rendered land virtually inalienable. It was those difficulties that in England hastened the statutory reforms of the mid-19th century leading ultimately to the Settled Land Act of 1882 and later legislation governing settled land in England. Unfortunately, those statutory reforms are not part of our law, and in St Vincent and the Grenadines we still face the serious disadvantages of settlements that England faced from the 12th to the mid-19th century. For completeness, it may be as well to add, though it does not apply in this case, that the Administration of Estates Act, Cap 377 at sections 37 and 38 do provide some amelioration of the strictness of the rule against disposition of land that is subject to a settlement in that the court is empowered on an application for a Grant of Letters of Administration to appoint special personal representatives of settled land, and for such special personal representatives to be clothed with the power to sell the settled land. No special personal representative was appointed in the estate in this case.

[39] The consequence of the above is that, as the deceased's Will contained no power of sale, if any of the properties in this dispute passed to the Defendants as settled land, the High Court, even with its unlimited jurisdiction, had no power to order or to permit a sale of that land. Indeed, it is the nub of the Plaintiff's case that those who in earlier litigation applied for orders of sale of the lands in dispute in this case sought to mislead the Court into error. Accordingly, it is the view of the Plaintiff, relying on the Privy Council decision in an appeal from the West African Court of Appeal of Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289, that any order for sale previously made by the High Court is a mere nullity, of no legal

effect whatsoever, and this court can set it aside or safely ignore it. The Plaintiff also calls in aid the decision of the UK Court of Appeal in Craig v Kanseen [Jan 16, 1943] All England Law Reports Annotated [Vol 1 CA]. The Plaintiff also relies on the decision of the UK Court of Appeal reported at Rouchefoucauld v Boustead [1897] 1 Ch 196 as authority for the principle that the Statute of Frauds did not prevent proof of a fraud from being given, and it was a fraud for a person to whom land was conveyed as a trustee, and who knew it was so conveyed, to deny the trust and claim the land as his own; therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant.

[40] Secret Trusts. During the course of the trial, counsel for the Plaintiff indicated that he would be contending that the deceased created secret trusts with respect to the properties at Villa, Frenches and Prospect. Counsel for the 1st Defendant has protested that she had examined the Statement of Claim in minute detail and had been unable to find any statement of fact which ought to have alerted her to the possibility of this allegation. She relies on the authority of the House of Lords case of Esso Petroleum Company Ltd v Southport Corporation [1956] AC 218 for the principle that the Plaintiff is bound by her pleadings and that the issue of secret trusts not arising on the pleadings the court ought to disregard it. It is the Plaintiff's submission, as we have seen, that the Plaintiff and the two Defendants held all the lands of their father under the terms of the trust that he provided for in his Will that were to govern his executor and trustee Barclays Bank International Ltd. Barclays Bank, as we have seen, had declined to apply for probate, and had renounced its right to be appointed. As we have seen, the Plaintiff and 2nd Defendant had subsequently obtained a Grant of Letters of Administration with the Will Annexed. The evidence of the Plaintiff was that up to the date of her father's death the children were unaware that, as a tax-planning device, the deceased had conveyed the properties to his daughters shortly before his death. Her contention was that at all times prior to his death he had impressed on his daughters that the 3 properties in dispute were not for their benefit but were theirs to use for their

lives only and that after their deaths the properties were to go to their children in equal shares. She relies on the UK case of Moss v Cooper (1861) 1 J&H 352. The 1st Defendant was at the time of these alleged conversations a minor, and prior to his death a schoolgirl and living in Canada, and in her testimony flatly denied any such instructions from her rather. The 2nd Defendant testified that she was aware that her father was leaving the properties in his Will to her and her sisters with life interests only, but she was of the view that this was his way of ensuring that no man who would enter their lives would be able to control the properties. She testified, that, in any event, she had always been of the view that once he had conveyed two of the properties to the three sisters beneficially, that took those 2 properties out of his estate. Counsel for the 1st Defendant on the substantive point of whether or not there was a secret trust also relied on the decision of Brightman J in the case of Ottaway and Another v Norman [1972] 1 Ch 698 where the test for a secret trust is set out. This required that it be shown that the deceased intended to impose an obligation on the primary donee which had been communicated to and accepted by the primary donee, either expressly or by acquiescence, and that clear evidence was needed to show that the deceased did not mean what he said when making the gift in absolute terms. Counsel for the 1st Defendant submitted that there was no credible evidence that the deceased had set up a secret trust of the properties as alleged by the Plaintiff.

[41] Constructive Trusts. Counsel for the Plaintiff submits that, as the Plaintiff and the 2nd Defendant knew that the desire of their father was that the 3 properties should not be sold by them, and that by their silence they had indicated to him that they would abide by his wishes, the Court must find that a constructive trust was imposed on the minds of all three sisters in respect of the Villa property and the Frenches property. The Plaintiff relies on the decision of the UK Lord Chancellor in the old case reported as Drakeford v Wilks (1747) Atk.540 and the UK Court of Appeal decision in Bannister v Bannister (1948) 2 All ER 133. He contends that upon the testator's death the Prospect property, both Frenches properties, and the Villa property became the subject matter of constructive trusts regardless

of what the deeds say. They were to be enjoyed by the Plaintiff and the Defendants for their lives only and upon their deaths by their 5 children and any other children they may have as tenants-in-common.

[42] By the word "trust", Counsel for the Plaintiff means a settlement as described above, not a trust for sale. A trust for sale is created by act of law when an estate vests in an administrator on an intestacy pursuant to the Administration of Estates Act, Cap 377 of the 1991 Revised Edition of the Laws of St Vincent and the Grenadines. A trustee holding on trust for sale has the usual duty of sale with a power to postpone that such a trust normally involves. If the three parties held any of the properties under a constructive settlement, then not only would they not have any power of sale, but the Court would not be able to permit or order a sale.

[43] Counsel for the 2nd Defendant submits that when the 2nd Defendant joined with the 1st Defendant to sell the Prospect property she did so by the authority of the High Court in suit No 270/1996 and that being a Trustee under the Will by virtue of the Grant of Letters of Administration she had the authority under the Trustee Act, Cap 383. Counsel for the Plaintiff responds that the Trustee Act applies only to trusts for sale and not to settlements. He submits that at no time was any of the property of the testator held on trust for sale. Indeed, it is the obtaining of the court orders for the sale of the Prospect Land that the Plaintiff considers was the fraud on the estate.

[44] Counsel for the 1st Defendant submits that if what the Plaintiff understood was that the deceased intended by the conveyance to impose an absolute restraint on alienation during the lives of his daughters then that restraint was void in law as being repugnant to the nature of an estate in fee. She relies on the authority of the decision of Pearson J in the Chancery Division in England in the case of In Re Rosher, Rosher v Rosher (1884) 26 Ch D 801 quoting Coke upon Littleton to the effect that if a feoffment be made upon the condition that the feoffee shall not alien the land to any person, this condition is void because when a person is

enfeoffed of lands he has power to alien them to any person by the law and if such a condition should be held good then it would oust him of all the power which the law gives him which would be against reason, and therefore that such a condition is void.

[45] Fraud. The basis of the Plaintiff's claim at paragraphs 16 and 17 of her Statement of Claim is fraud. She prays that the judgments in the earlier cases and the conveyances that the Defendants have made in the Prospect Lands should be set aside on the basis of fraud. She testified in her evidence that she does not really consider that the Defendants committed any fraud other than their desire, contrary to her recollection of the deceased's wishes, to relieve themselves of the burden of the co-tenancies that prevented them from dealing in the properties. Counsel for the 1st Defendant relies on the UK Court of Appeal authority of In Re Rica Gold Washing Company (1879) 11 Ch D 36 for the principle that where pleadings raise only vague allegations of fraud then evidence of fraud is not admissible; that in equity where you allege fraud you must state the facts which you say amount to a fraud so that the other party may know what he has to meet. She also relies on the decision of Lord Selborne LC in the UK Court of Appeal decision in Wallingford v The Mutual Society (1880) 5 App Cas P 685 to the same effect. She also relies on the UK authority in the House of Lords case of Jonesco v Beard [1930] AC 298 for the principle that when impeaching a completed judgment on the ground of fraud by an action the particulars of fraud must be exactly given and the allegation must be established by strict proof.

[46] Failure to Join the Children and the Purchasers. Counsel for the 1st Defendant has submitted that the failure of the Plaintiff to join her children as parties to the suit makes it impossible for the court to grant any remedy to the children, if any is found due. She produced the old UK case of Pidduck v Boultbee (1852) 2 SIM (NS) 223 in support of her argument that this court cannot give any remedy to the children of the Plaintiff as they are not parties to this case. That case is authority for the well-known principle that a motion by the next friend

of infants is irregular, the motion should be by the infants by their next friend. Counsel also objects to the claim by the Plaintiff that the court has jurisdiction, if it finds that the transfers of the Prospect Land by the Defendants were not authorised, to set aside those conveyances even though the purchasers have not been made parties to the action. She submits that the Plaintiff must show that the purchasers were not bona fide purchasers without notice, and failure to do so is fatal to the Plaintiff's case. She relies on the authority of Thorndike v Hunt [1859] 3 DEG&J 563.

[47] Conclusion. The 1st Defendant was a schoolgirl at the time of the alleged conversations with the deceased and the subsequent death of the deceased. I do not believe that the deceased could have held the alleged conversations with her about her holding the properties with her sisters in trust for any children that they might later have. Nor do I believe that if the deceased did have such a conversation with the 1st Defendant she was as a minor competent to give the undertaking alleged by the Plaintiff. I accept the testimony of the 2nd Defendant that she gave no such undertaking express or implied to her father to hold the properties conveyed to her and her sisters on the trusts of the Will, but that she always understood that he intended by transferring the properties to them as he did in the conveyances not to create a trust for his grandchildren but only to protect his daughters from the imprecations of the men who would come into their lives by complicating the titles to the properties by conveying them to the daughters in common. The 1st Defendant had no knowledge of either of the deeds at the time of her father's death and only found out about them years later. Only the 2nd Defendant was in St Vincent at the time of the deeds and she admitted to knowing of them at the time they were made, but she denied the existence of a secret trust. It is unlikely that the Plaintiff, who was also at the time studying in Canada, would have learned of the deeds until the time of the application for the Grant of Letters of Administration to herself and the 2nd Defendant in October 1980. In the circumstances described above, I am satisfied that the transfers of the Frenches and Villa properties to the three sisters by the

deceased prior to his death were free of any trust, secret or otherwise. The parties hold those properties as owners in common in equal shares absolutely by virtue of the conveyances to them. That co-ownership is susceptible to severance in any of the usual ways. Where one co-owner does not consent to a sale, there is no legal obstacle to the other co-owner applying for the sale of property held in co-tenancy. There is no reason why the Order made by Cenac J in suit No 204/1996 should not be complied with.

[48] As an aside, I observe that the deeds No 967 and 977 of 1977 relating to the Frenches and Villa Lands were executed by the deceased alone, and not the three parties to this suit who were named as the other parties to the deeds. This is commonly found amongst the deeds in St Vincent where, at least in recent years, only the donor or vendor signs and not the donee or purchaser. A deed of conveyance of real estate vesting the fee simple in land in purchasers is normally an indenture which one would expect to see executed by all of the parties to the deed. Only a deed poll is normally executed by one party. The deeds in evidence in this case are strictly not indentures but a deeds poll. The Court has heard no argument on the legal effect in St Vincent of a registered deed drafted with parties as an indenture but being executed by only one of the proper parties to it. Nor was this in issue in the pleadings. The Court, therefore, makes no ruling on whether or not such a deed poll relating to land is valid in St Vincent as a deed of conveyance. That issue, if it is an issue, will have to await argument in another case.

[49] As a further aside, I observe that the form of the possessory title to the Prospect Land registered by the two Defendants as deed No 334 of 1996 is peculiar to conveyancers practising in the State of St Vincent and the Grenadines. It is commonly found produced as an exhibit in court cases. It is usually in the form of a statutory declaration, and invariably claims somewhere in its body, as in this case, to be made under the provisions contained in the Oaths Abolition Act or some other Act. There is no Oaths Abolition Act. Oaths have not yet been

abolished in St Vincent and the Grenadines. There is in existence a Declarations in Lieu of Oaths Act, Cap 157 of the 1991 Edition of the Laws of St Vincent and the Grenadines. This Act is sometimes quoted as the authority for the preparation and registration in the Registry of Deeds of this type of statutory declaration. This is the familiar Act found throughout the Commonwealth Caribbean which was passed by our legislatures in the early decades of the 20th Century to permit persons, who for religious reasons objected to swearing an oath, to declare and affirm instead, and for their testimony taken after such an affirmation to be subject to the same penalty of perjury as is testimony taken on oath. That Act does not permit or authorise a declaration to be made relating to an interest in land. Such provision is found in some States of our jurisdiction in a Statutory Declarations Act. There is no Statutory Declarations Act in St Vincent. A Statutory Declarations Act might if it had been passed have permitted documents described as statutory declarations relating to possessory titles to land to be prepared and registered. Other than the coincidental use of the same word "declaration" in the titles of the two Acts, there is no connection between the Declarations in Lieu of Oaths Act and a Statutory Declarations Act. In other jurisdictions of our region it is normal for possessory titles to be registered by the squatter executing a deed of conveyance in his favour whereby he conveys to himself the fee simple in the land that he has been squatting on. In the absence of a Statutory Declarations Act authorising a statutory declaration, a deed of that sort is as good a document as any to register in the Registry of Deeds as evidence of a claim to possessory title to land. No authority appears, other than recent custom amongst conveyancers, for the use of such unauthorised statutory declarations. However, as I have heard no argument on the validity or otherwise of this apparently unauthorised form of "declaration" produced in evidence in this case, I make no finding on it. That will have to await another case.

[50] I find that only the Prospect Land passed to the two Defendants under the Will of the deceased. The matter has been made unnecessarily complicated. The Prospect Land was never subject to a settlement in the Will of the deceased. The

Prospect Land was intended by the deceased to pass under his Will to the two Defendants for their lives and after their deaths to pass to the "heirs and assigns" of the three daughters. That is, he provided for the transfer of the legal and beneficial interests in the Prospect Land directly to his issue, and he did not provide for it to be held by his trustee upon trusts in his Will similar to those that he created relating to the Frenches and Villa properties. The Administrators, once they obtained the Grant, held title to the Prospect Land on a statutory trust for sale only until such time as they had divested themselves of title by transferring it in the erroneous way that they did to the two Defendants. From that moment, the Administrators, and that would include the Plaintiff, had no further interest in the Prospect Land. The two Defendants as owners of the Prospect Land, holding it as they did under a deed that was clearly in error, were entitled to take the matter before the High Court for an order for sale and partition under the Partition Act, Cap 245, as they did before Cenac J in suit No 270/1976. The Order made by Cenac J had on their application placed a greater burden on them than their father had intended in his Will. Their offer to the Plaintiff to vest the Prospect Land in her had been a sensible and generous one, but she had declined it and it is now lost to her.

[51] This Order made by Cenac J in suit No 270/1996 relating to the Prospect Land appears to have been based on the error of the Defendants as to the nature of their title to the Prospect Land. They described themselves in their application as being life tenants of and as being trustees of the Prospect Land. There is no indication as to how they considered that they came to be life tenants, or how they came to be trustees. If the two Defendants had held under the terms of the Will, they would have held a life interest only, with remainder to the "heirs and assigns" of the Plaintiff and the two Defendants. In the event, title had been vested in them by the erroneous deed of assent. The deed of assent had vested the property in them not as life tenants, but as owners of the fee simple absolute. If they held title to the Prospect Land under the deed of assent No 23 of 1982, they held the fee simple absolute. Similarly, there is no explanation as to why they described

themselves in the title to suit No 270/1996 as holding the Prospect property on "trust for sale." Neither under the Will nor under the deed of assent were they trustees. No trust for sale or other trust arises under the law of St Vincent, unlike in England, when a life interest is created. A life interest is a valid legal estate in the law of St Vincent. The Will did create a settlement of some of the deceased's property. The Will, however, expressly did not create a settlement of the Prospect land as it had for the Frenches land and the Villa land. The Defendants would only have held the Prospect Land on a trust for sale if they had been the Administrators, which they were not. The conclusion is that, contrary to the Defendants' statement in their application to the court in suit No 270/1996, they did not hold the Prospect Land either as life tenants or as trustees whether for sale or otherwise. It is quite likely that this reference to the Defendants as being trustees resulted from no more than an error in drafting. The Order made by Cenac J and which appears to have erroneously placed on the Defendants a burden to act as trustees and limiting them to a life interest only were the result of statements made by the Defendants themselves and from the way in which they describe themselves in their application. The Defendants described themselves as trustees for sale of the Prospect Land, and Cenac J treated them as such in his Order. They are certainly bound by the part of the Order that limited them to life interests. The Defendants, like their sister the Plaintiff, did not appear from evidence to have been aware of the duties incumbent in a trust. As the parties gave their evidence, it became apparent that they were not aware of the meaning of or any legal distinction among any of the terms "co-ownership", or "life tenancy", or "trust". The 2nd Defendant repeatedly testified that the grandchildren of the deceased were the "benefactors" of the life tenancy and the trusts. Despite having been a long-time employee of a bank, she did not know the difference between a benefactor and a beneficiary. The Plaintiff and the two Defendants may not have been the most professional of trustees, but the quality of the professional assistance given to their father in the preparation of his Will and to the heirs over the administration of the estate is also open to question.

[52] The application by the Defendants in suit No 270/1996 had admittedly not joined the Plaintiff as a party. But, there was good reason for this. It is to be remembered that, though the Plaintiff claimed in her pleadings in this case and testified to the effect that she held a legal interest in the Prospect Land as an administrator and trustee by virtue either of the Letters of Administration or of a constructive or secret trust, she had by deed No 23 of 1982 divested herself of her title to the Prospect Land and had vested it in the two Defendants absolutely. The Defendants, quite understandably in my view, protest that the Plaintiff had no right to be made a party to those proceedings in suit No 270/1996. The two Defendants, accepting that an error had been made in the deed of assent to them, considered that they held the Prospect Land as tenants for life, and that after their deaths it was to pass to the children of the three of them. The Plaintiff was not entitled to expect to be made a party to any application to the court relating to the Prospect Land. The situation is different as regards the children of the parties. Their children, in the minds of the Defendants at least, all had an interest in the remainder of the Prospect Land, and may well have had a right to be represented in any application made to the court for the disposition of the Prospect Land.

[53] The parties all appear to have believed that the testator used the word "heirs" in the Will with the limited meaning of "grandchildren." No one has explained to me how the deceased, or his lawyer who drafted clause 10 of his Will of 7 November 1975 relating to the Prospect Land, came to use the phrase "heirs and assigns" to mean "issue." The phrase "heirs and assigns" is commonly found in conveyances. It is not a phrase that one would expect to find in a will as a description of remaindermen who were to take after a life tenancy had determined. The meaning of the words in their ordinary sense defies the limitation claimed by the Plaintiff and accepted by the Defendants. A devise of a life tenancy with the remainder to "heirs and assigns" is capable of meaning a devise of the fee simple and not of a life estate. Additionally, if the testator had meant by the use of the word "assign," as use of the word suggests, that an assignment by the life tenant of the devised land was permitted, then it is difficult to see how that would square

with an intention to prohibit the sale by the life tenants and to devise the freehold remainder to the grandchildren of the testator. The same question arises with the devise in clause 5 of the "small" property at Frenches, and in clause 6 of the "large" property at Frenches and in clause 8 of the Villa property. However, I accept that, in the context of this case, the word "heir" as used in the Will is synonymous with the words "issue" or "grandchildren," not least because that was exactly what Singh J decided in suit No 445/1989. That decision of the court in suit No 445/1989, in view of the anomalies described above, was for the benefit of and not a fraud on the grandchildren of the deceased.

[54] There has been no explanation as to why the grandchildren, by someone acting on their behalf, were not made parties to either of these 1989 and 1996 actions. However, as no appeal was made against the orders nor any action brought specifically to set them aside, other than this action, nor does it appear that any fraud has been committed on anyone by either of the 1989 and 1996 actions, or by the Defendants as a result of the Orders made in either of these earlier action, nor have the children been made parties to this action and thus capable of complaining of any action allegedly taken against their interests, I do not consider that there is any need to dwell on the Orders further.

[55] From the cross-examination of the 1st Defendant by counsel for the 2nd Defendant, it became apparent that 2nd Defendant does not consider that the 1st Defendant has treated her fairly in accounting as she did for the proceeds of the sale of the Prospect Land. She believes that the 1st Defendant has wrongfully withheld a portion of the share that should have been paid to her according to the formula in the actuary's report. The 2nd Defendant has not sought any relief against the 1st Defendant in this suit in relation to that claim of unfair treatment. Additionally, there has been no proper airing of this complaint by the 2nd Defendant. The complaint was not pleaded and only arose for the first time on cross-examination of the 1st Defendant. I do not propose to give any directions or make any order in respect to this complaint of the 2nd Defendant. The

Defendants may wish to take advice on how to sort this matter out between themselves without resorting to the expense of further legal proceedings.

[56] The Plaintiff has not suggested that the share of the distribution of the proceeds of the sale of the Prospect Land made by the 1st Defendant to the Plaintiff's children was not, as testified by the 1st Defendant, exactly in accordance with the Order previously made by Cenac J. The 1st Defendant's failure to account to the Plaintiff fully and accurately as regards the sale of the Prospect Land is not the principal complaint of the Plaintiff. The Plaintiff is not suggesting that the 1st Defendant has underpaid the share of the Plaintiff's children. The Plaintiff's complaint was, instead, that the entire proceedings including the Orders obtained from Singh J and Cenac J were frauds by the Defendants on the ground that they were in breach of the settlement that she considered applied to the properties. As I have found that the Plaintiff has not established this claim, I do not consider that it is appropriate to make any further order for any more detailed accounting by the 1st Defendant to the Plaintiff.

[57] It follows that I find that all the claims of the Plaintiff against the Defendants are without merit. The suit of the Plaintiff is dismissed. The Defendants are entitled to their costs of this suit, to be paid by the Plaintiff, and to be taxed if not agreed.

[58] I must thank all three counsel for the care with which they prepared their submissions and for the thoroughness with which they argued their clients' cases. This greatly assisted the court in coming to grips with the issues raised by them.

I D MITCHELL, QC
High Court Judge