ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 275 OF 1998

BETWEEN:

ADINA GARNES and DENNIS HADAWAY
EXECUTORS OF THE ESTATE OF DAVID GUMBS, DECEASED

Plaintiffs

and

JOEL GUMBS

Defendant

Appearances:
Richard Williams for the Plaintiffs
Emery Robertson for the Defendant

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2001: January 16, 17, 25, April 11
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JUDGMENT

[1] MITCHELL, J: This is a land dispute between two of the three Executors of the Will of the late David Gumbs (hereinafter "the Deceased") and an alleged trespasser on a part of the estate.

[2] The action commenced by the issue on 25 June 1991 of a specially endorsed writ. By the endorsement on the Writ, Adina Garnes and Dennis Hadaway (hereinafter "the Plaintiffs") claimed that the Deceased made his last Will whereby he appointed the Plaintiffs the sole Executors; that the Deceased died on 26 March 1995; that on 7 July 1995 the Plaintiffs obtained a Grant of Probate of the Will; that included in the estate are 21 ¾ acres of land at Very Vine, and 7 acres of land at Cocoa Mountain; that at the death of the Deceased, Joel Gumbs (hereinafter "the Defendant") was working a part of the Cocoa Mountain land on a share crop basis;

that after the death of the Deceased, the Defendant was told not to do any further planting but to reap his crop and to deliver up possession; that the Defendant began to work more of the Deceased's land; that the Defendant was given 3 months' notice to leave the land; that the Defendant reaped truck loads of crops and sold them and had not given the Estate's share of the proceeds of sale to the Plaintiffs; and that in April 1997 the Defendant began cultivating the land at Very Vine and continued to do so in spite of having been spoken to. The Plaintiffs claimed recovery of possession of both areas of land; an injunction; an accounting by the Defendant; and damages for trespass.

[3] On 20 July 1998, Mr Grafton Isaacs entered an appearance on behalf of the Defendant, but the Defendant neither served nor filed any defence. As will later appear, the Defendant retained another solicitor, Mr Howard, to assist him in negotiating a settlement with the Plaintiffs. On 1 June 1999, for reasons that will appear later, the Plaintiff moved the Court for a final judgment in default of a defence. The Defendant changed his solicitor to Messrs Robertson and Robertson, and applied for an extension of time to file his defence and counterclaim. The Plaintiff resisted this latter application. The Court, however, as is normal in these cases, gave the Defendant leave to file his defence out of time on his paying agreed costs to the Plaintiff of $600.00.

[4] On 9 July 1999, the defence and counterclaim was filed. The Defendant claimed that the Will appointed three Executors, the two Plaintiffs and one Olive Kirby; that the Defendant would raise the objection on a point of law that the action as brought is bad in law and ought to be struck out; that he had not been working the Cocoa Mountain land on a share crop basis but had been in continuous uninterrupted possession since the year 1964; that he had always asserted that, by virtue of section 17 of the statute of limitations, the right of the Plaintiffs to recovery of the land was barred; that he had been a licensee of the Deceased to an indeterminate area of land at Very Vine prior to the death of the Deceased; that, after the death, Natto Gumbs and Granville Gumbs, two devisees of the Will,

had given the Defendant permission to work their share of the land at Very Vine; that he was prepared to withdraw from any land in excess of the 4 ½ acres to which they were entitled; that his occupation was lawful, and that to date his licence had not been legally terminated either at common law or under the Agricultural Small Tenancies Act, Cap 29; that the notice regarding the Cocoa Mountain land was defective; and the Defendant counterclaimed for a declaration that he was entitled to the parcel of land by virtue of the Limitation Act, Cap 90.

[5] On 2 November 1999, the Plaintiffs filed their reply and defence to counterclaim. They claimed that the third Executor resided in the USA; that the Defendant had admitted that he had been working the land at Cocoa Mountain on a share crop basis, and had agreed to make a payment of $5,000.00 for the Estate's share of the crop, and had actually made a payment of $500.00 towards that amount; that the Defendant had been granted an extension of time to 15 October 1999 to quit and deliver up the lands; that no deeds of assent had been given to any of the devisees under the Will nor had any of them been put in possession of any of the lands.

[6] On 25 November 1999, the request for hearing was filed. The matter came up for trial on 15 January 2001 at 9 am. Counsel for the Defendant rose to his feet to make an objection in law *in limine*. He submitted that the objection had been pleaded at paragraph 1 of the Defence: that the action as brought by two out of the three Executors was bad in law and ought to be struck out. He had no law for the assistance of the Court in support of his submission, but, he advised, it could be found in the books, it was trite law. The Court ruled that that was not good enough, and that it would adjourn the matter until the following morning for counsel to submit his argument properly and with copies of his authorities for the Court and for counsel.

[7] On the following day, 16 January 2001 at 9 am, counsel for the Defendant rose to repeat his *in limine* objection. He submitted that the action as constituted was

improper. Three Executors had proved the Will but only two had brought the action. He referred to Atkins Court Forms, Vol 2 of the 1996 edition, page 13, a copy of which pages he produced, and the case of Latch v Latch (1985) 10 Ch App 464 referred to in the volume, copies of which he stated were being prepared for the use of the Court and of counsel. The Court could not help but notice that the pages of Atkins produced by counsel dealt with Administration Actions and not with actions in tort. His second submission was that at paragraph 7 of the statement of claim it was evident that the Plaintiffs had given the Defendant 3 months notice, while section 3 of Cap 29 required 6 months notice. He submitted that, although the Act spoke of a tenancy, even where there was no tenancy but only a licence, the 6 months' notice requirement of Cap 29 applied. He had no law for the assistance of the Court on this second submission, which he submitted was trite law.

[8] Mr Williams resisted the submissions made by Mr Robertson. He submitted in reply that on the first point he was in agreement that if the matter was a Probate Action, or an Administration Action under either of Orders 53 or 63 of the Rules of the Supreme Court, there were rules about joining all the Executors. But, he submitted, those rules did not apply to an action in tort brought by one or more of the Executors to protect the assets of the Estate. He referred to Williams Mortimer & Sunnucks on Probate, Chapter 57, page 683 under the rubric Joint Representation, copies of which he produced. On the second point, he submitted that the Defendant was at best a licensee and at worst a trespasser of the Very Vine land, and claimed to be the owner of the Cocoa Mountain land, and as such was not in possession under a contract of tenancy, and was not, therefore, entitled to the notice protection of the Act.

[9] The Court indicated to both counsel that it was not satisfied that any law or authority had been produced to assist the Court on the specific points raised in the submissions. This was an action in tort and not a Probate Action or an Administration Action. Counsel for the Defendant requested a 15-minute

adjournment to produce legal authorities in support of his contentions, which application was granted. Thirty minutes later the Court sitting resumed. Counsel for the Defendant was not present in the Courtroom. The Court was not prepared to wait further, and requested counsel for the Plaintiff to call his first witness. Counsel for the Plaintiff applied for an amendment to the statement of claim and was instructed to hold the application until counsel for the Defendant returned to the Courtroom and was present. The Plaintiff's case commenced with the testimony of the first Plaintiff. A few minutes into her evidence, counsel for the Defendant returned to the Courtroom. He was advised that the Court had decided, in the absence of any law or proper authority in support of the submissions of the Defendant, to hear the evidence and to rule on the preliminary submissions and on the evidence at the conclusion of the case. The evidence given by the witness up to that point was read over to counsel, and the witness resumed her testimony. The application for the amendment sought by the Plaintiffs was renewed and was granted.

[10] Giving evidence for the Plaintiff were Adina Gumbs and Arthur Williams, her solicitor. Arthur Williams gave evidence of an agreement he said the Executors had reached with the Defendant after the issue of the writ in the case. During the course of his cross-examination, counsel for the Defendant indicated that he objected to the testimony given in examination in chief relating to the discussions that had taken place between the parties and their lawyers as having been privileged negotiations with a view to settlement. Counsel for the Plaintiff replied that the privilege applied only to incomplete negotiations, not to a concluded agreement between parties to litigation. He contended that Arthur Williams had not given evidence of negotiations but of a concluded agreement. While it seemed a little late for the Defendant to be making such an objection, the Defendant not having raised the objection in a reply to the Plaintiffs' defence to his counterclaim, when the Plaintiffs first raised the issue of the agreement, nor having made the objection at the time of the evidence in chief, and having raised it only in questions to Mr Williams in cross-examination, the Court ruled that it would be for the Court

to decide after having heard all the evidence whether or not there had been privileged negotiations, and would rule on the matter in the final decision. Mr Robertson indicated that he would be satisfied with that.

[11] The Defendant himself and Cyril Alexander, a daily paid worker who had been employed by him in cultivating the land at Cocoa Mountain from the early 1970s, gave the evidence for the Defendant. A number of exhibits were put in evidence. These included the Grant of Probate of the Will of the Deceased, correspondence between the Defendant and the Plaintiffs' Solicitors, a receipt given to the Defendant for monies he had paid to the Plaintiffs' Solicitors, and an unsigned draft in writing of the alleged Agreement made between the Defendant and the Plaintiffs in settling the Suit.

[12] The facts as I find them are as follows. The Deceased, David Gumbs, held lands at Cocoa Mountain and Very Vine, both lands being situate in the Vermont Valley in St Vincent, but separated from each other by a distance of several miles. The Deceased had lived and worked in the UK for many years before returning at some unknown date in the past to St Vincent in his retirement. During his retirement he received a pension from the UK. On 1st November 1991, he made his last Will and Testament. By that Will, he appointed Dennis Hadaway of Vermont in St Vincent, Adina Garnes formerly of St Vincent, but residing in Barbados, the 1st Plaintiff, and Christa Olive Kirby, formerly of St Vincent, but residing in the USA, as the Executors of his Will. The evidence revealed that Adina Garnes has lived in Barbados for most of her life. Similarly, Christa Olive Kirby has resided permanently in the USA for very many years. Only Dennis Hadaway was living in St Vincent at the time of the making of the Will and at the time of the prosecution of this lawsuit. Dennis Hadaway played no role in the case, only Adina Garnes did. The 1st Plaintiff had to come from Barbados to give her evidence on behalf of the Estate. She was obviously the only Executor who was interested in the administration of the estate.

[13] It is not certain how the Deceased came to own his lands at Cocoa Mountain and at Very Vine in the Vermont Valley. No deed of his was put in evidence by either of the parties. The lands have never been surveyed. At least, no survey was put in evidence or mentioned in the testimony. The result is that neither the provenance of the titles to the two lands in question nor their exact areas are known. An estimate is that the Cocoa Mountain land is about 7 acres in area, and the Very Vine land is about 21 ¾ acres in area. That is what the Deceased claimed in 1991 when he gave his solicitor instructions to prepare his Will, and that is what the Executors put in the 1995 application for the Grant of Probate. The Defendant did not dispute the acreage claimed by the Deceased and his Executors, and so, as between the two of them, that is the acreage.

[14] The Plaintiffs' claim was that at some point the Deceased made an arrangement with the Defendant to plant the Deceased's Cocoa Mountain land and to share the proceeds with the Deceased. The Defendant denied that the Cocoa Mountain land that he was working ever belonged to the Deceased, or that he had ever worked that land under an arrangement with the Deceased. He testified that the land belonged originally to his father, and that when his father died in 1975 he simply continued working his father's land. The Defendant is an energetic and successful planter of various lands. He said he had never recognised anybody else as owning that land. How his father had come to own the land he did not know. The acreage owned by his father has never been surveyed and is unknown. All he knew was that his land was about 6 ½ acres and was squeezed between the Vermont Nature Trail land of the Crown, the public road, and the land occupied by one 'Tear-Up,' whose real name he did not know. It may well be that neither the Deceased nor any other party in this suit owns any of the land at Cocoa Mountain. The Defendant testified that when the Deceased returned to St Vincent from England, he met the Defendant working the Cocoa Mountain land and never questioned his right to occupy that land. From the evidence, it is clear that the land at Cocoa Mountain claimed by the Deceased and the Plaintiffs on the

one part and the land claimed by the Defendant on the other part are identical, save for a small and inconsequential difference in size of a half acre.

[15] When the 1st Plaintiff went to speak to the Defendant in 1995, after the death of the Deceased, about accounting for the Estate's share of the profits, he denied that he was under an obligation to do so. He testified, and he was not doubted, that the Water Authority had recently acquired some of the Cocoa Mountain land in question to build water tanks for the public water supply. The Water Authority had paid him compensation for the crops he had on the acquired land. This payment confirmed in his mind his right to the land in question. The Water Authority has, apparently, not paid anybody as yet for the land itself and is awaiting the outcome of this suit in order to know whom to pay. I am satisfied that the Cocoa Mountain land claimed by the Deceased and the land claimed by the Defendant are one and the same land. The question is, do I believe the Plaintiffs that the land belonged to the Deceased, or do I believe the Defendant that the land belonged to his father. Did the Deceased claim the Defendant's Cocoa Mountain land in his 1991 Will when he had no right to do so? Did he make up out of thin air a claim to the land? Did he, perhaps, really mean to refer to some Cocoa Mountain land other than the land occupied by the Defendant? Or, on the other hand, did the Defendant first set up a claim to the land of the Deceased after the death in 1995 of the Deceased, knowing that there was nothing in writing to show who owned the land in question? I discount the evidence of the claim in the Will as being self-serving. On the other hand, I do not believe that the Deceased, given the good relationship between him and the Defendant, would have concocted shortly before his death a claim to the Defendant's father's land long occupied by the Defendant and his father before him. I discount the theory that the land claimed by the Deceased might have been other land, as no suggestion was made that there is other land at Cocoa Mountain that the Deceased might have been referring to. I also discount the evidence of the 1st Plaintiff that she was present on one occasion in about 1992 and witnessed the Defendant paying part of the proceeds to the Deceased. Similarly, I place no reliance on the

Defendant's essentially unsupported claim that the land belonged to his deceased father. I look instead for some admission against interest, or written document, or other reliable fact or evidence that can point me in the right direction. And that is where we come to the evidence of Mr Arthur Williams, who, at the time of the transactions he testified to, had been the solicitor for the Plaintiffs. The testimony of Mr Williams related to transactions between himself as solicitor for the Plaintiffs, the 1st Plaintiff, the Defendant, and his then solicitor, Mr Howard, after the issue of the writ in this case. If the evidence of Mr Williams is admissible, then there had been, at the time in question, both in 1995 and in 1998, a clear admission on the part of the Defendant that he has no right to the Cocoa Mountain land. If the evidence of Mr Williams is inadmissible, then there is very little except the unreliable oral evidence of the parties to help the Court on the question of the ownership of the Cocoa Mountain land.

[16] The submission of the Defendant is that the evidence of Mr Arthur Williams is inadmissible on the ground that the court does not allow evidence of negotiations conducted between litigants with a view towards a settlement of a pending suit. Such negotiations are "without prejudice" and privileged. The Defendant submits that that is what Mr Williams has testified about, privileged discussions. The response by counsel for the Plaintiffs is that there is no quarrel with the Defence over the law of evidence regarding "without prejudice" negotiations. However, the Plaintiffs submit, the negotiations in question resulted in a concluded agreement, and with the Defendant completing and perfecting the agreement by making a first payment on it. The submission of the Defendant is that the agreement was only to be completed and perfected when the agreement was signed; that until then there were only negotiations.

[17] The evidence that I accept is that after the death of the Deceased in 1995, Mr Arthur Williams applied for and obtained for the Plaintiffs a Grant of Probate numbered 99 of 1995. On the instructions of the Plaintiffs, he then wrote the Defendant giving him notice to quit the Cocoa Mountain land of the Deceased. On

the Defendant receiving this notice, he visited the offices of Mr Williams in 1995 and requested a lease of the Cocoa Mountain land from the Executors. Mr Williams consulted with the Executors, and on their instructions he wrote the Defendant that the Executors were not interested in leasing the land. At this time the Defendant was not occupying as yet the Very Vine land of the Deceased. The Defendant not vacating the Cocoa Mountain land, Mr Williams on instructions in 1998 issued against him the writ in this action. The Defendant entered an appearance to the writ through Mr Grafton Isaacs.

[18] Instead of filing a defence, the Defendant personally contacted Mr Williams and asked him to set up a meeting with the Executors. The meeting was set up for 15 October 1998, and he attended with his brother, and another solicitor, a Mr Howard, at a meeting at the chambers of Mr Williams. Present for the Plaintiffs were Mr Williams and the 1st Plaintiff. The Defendant requested time to leave the Cocoa Mountain land. In exchange for the Estate giving him one year until 15 October 1999 to reap his crops and vacate the lands of the Deceased, the Defendant agreed to pay the Estate $5,000.00 for the Estate's share of the produce reaped from 1995 to the 15 October 1998, and 1/3 of the profits for crops reaped between 15 October 1998 and 15 October 1999. He agreed to pay the sum of $5,000.00 by monthly instalments of $500.00, the first instalment being due on 15 November 1998. Some days later, on 4 November 1998, the Defendant duly attended at the chambers of Mr Williams and paid the first instalment of $500.00 to Mr Williams, which was receipted by Mr Williams' office receptionist as having been received as "rent for in [sic] the Estate of David Gumbs." It is accepted that this was an error on the part of the receptionist as there was no rent due from the Defendant to the Estate. The Defendant took away from the chambers of Mr Williams at the same time a written draft of the agreement that Mr Williams had prepared. He wanted to check it before signing it. The Defendant testified that, at that point, one of the beneficiaries of the Estate gave him permission to occupy the beneficiary's share of the Very Vine land. The beneficiary in question did not appear at the trial to testify. But, there is no reason

to doubt that the Defendant had discussions of some kind with one or more of the heirs after the conference in Mr Williams' chambers. There has to be some explanation as to why he ceased to make payments on the agreement, or to sign and return the written agreement. In the event, the Defendant never signed the agreement. It is on that basis that the Defendant claims that the agreement with the Estate was never concluded, and that all the negotiations with the Estate were with a view to settlement and were made without prejudice to the Defendant's rights. The Defendant did not make any further payments to the Plaintiffs on his agreement. The Plaintiffs subsequently moved the court for judgment in default, and as has been mentioned earlier, the court gave the Defendant leave to defend.

[19] The Defendant also testified that Mr Williams had not been truthful when he said that the $5,000.00 that the Defendant had agreed to pay related only to the crops reaped from Cocoa Mountain as the Defendant had not yet at the time of the agreement reaped any crops from the Very Vine land. The Defendant's recollection was that the Deceased had put him in possession to cultivate an indeterminate area of his Very Vine land before his death in 1995, that after the Deceased's death he had been negotiating to lease from the Estate a portion of the Very Vine land, that he had subsequently obtained the verbal permission of one of the Very Vine heirs to occupy that heir's share of the land, that he was occupying more than the area that he should have been, that Mr Williams had told him he had to pay $500.00 per month to a total of $5,000.00 as compensation for the excess Very Vine land he was cultivating, and that he had agreed to that. He denied that the payment of $500.00 related to the Cocoa Mountain land. However, I do not believe him.

[20] I am satisfied that all the evidence points to the Deceased having had a very good relationship with the Defendant up to the time of his death. The Deceased and the Defendant were first cousins. The Deceased suffered from a badly infected foot, which caused bus drivers to refuse to take him on their buses. The Deceased had to visit the clinic three times a week to change the dressing on the sore. The

Defendant, up to the time of the death of the Deceased, took the Deceased in his car on these thrice-weekly visits to the clinic. I am satisfied that the Defendant occupied the Cocoa Mountain land by licence from the Deceased, and may even have shared the proceeds of the vegetable produce with the Deceased, though the evidence on this is flimsy. The witness for the Defendant gave evidence of having worked for the Defendant on the Cocoa Mountain land for a long time, but he would not necessarily have known of any arrangement with the Deceased. In any event, he was hardly either an independent or a reliable witness.

[21] When the Defendant went to the office of Mr Williams in 1995, he was cultivating only the Cocoa Mountain land and not yet the Very Vine land. The Defendant in 1995 attempted to negotiate with the Executors a lease of the Cocoa Mountain land. He made no claim that the land belonged to him at this time. When the lease was refused, he continued to occupy and to cultivate the Cocoa Mountain land. His eye began to extend out to the Very Vine land that he had learned about from his close relationship with the Deceased before he died. As a result of his refusing to vacate the Cocoa Mountain land and beginning to occupy the Very Vine land, the Writ was served on him in 1998.

[22] When the Defendant went back to the office of Mr Williams in 1998 with his solicitor Mr Howard, he went to negotiate for time to get off the Cocoa Mountain land and the Very Vine land, to negotiate a lump sum payment as the Estate's share of the money he had earned on the Cocoa Mountain land since he had been given notice in 1995, and to arrange a method to calculate how he would compensate the Estate for the money he would earn from the Cocoa Mountain land and the Very Vine land from that point on. He came to a complete agreement and paid the first instalment on it. He was advised by at least one, if not two, firms of solicitors before he attended at Mr Williams' chambers and made his first payment on the agreement he had entered into. It was only when one of the heirs later encouraged him to remain in possession of the Very Vine land that he began his enterprise of claiming the Cocoa Mountain land as his own. He now claims to

occupy the Cocoa Mountain land as of right, and to have a right to occupy a part of the Very Vine land by permission of one of the heirs. I do not believe him.

[23] I am satisfied that, under the provision of O.15 of the Rules of the Supreme Court, an Executor out of the jurisdiction of the court is not a necessary party to an action: see the White Book, 1970 Edition, paragraph 15/14/8 under the rubric "Necessary Parties." The objection of the Defendant to the 3rd Executor not being a party to this action is overruled. I am further satisfied that the evidence given by Mr Williams concerning the agreement did not relate to privileged negotiations but to a concluded agreement made in his presence and perfected by the payment by the Defendant to him on behalf of the Plaintiffs of the first instalment due from the Defendant under the agreement. The submission of the Defendant on this point is also overruled.

[24] It is well established that an heir has no right in law to put someone in possession of any part of the estate against the wishes of the Executors. The Defendant has no right as against the Executors to remain in possession of any part of the Very Vine land. He went on the Very Vine land because he was annoyed with the Executors for not leasing the Cocoa Mountain land to him, and as part of a campaign on his part to deprive the Estate of property belonging to the heirs of the Deceased. The Defendant was not entitled to any notice in relation to the Very Vine land, as he was a trespasser on them *ab initio*. Nor was the Defendant entitled to any notice in relation to the Cocoa Mountain land, as he did not claim to be a tenant but to be the owner. The counterclaim brought by the Defendant is dismissed.

[25] Among the remedies sought by the Plaintiffs is an accounting by the Defendant. There is no evidence that the Defendant keeps any records of his agricultural business. From the Court's general knowledge of how St Vincent small-farmers do their business, it is quite unlikely that the Defendant will be able to produce any records for his earnings over the past 5 years from the lands of the Deceased that

he has been cultivating. It would be futile for the Court to make such an order. On the other hand, if, as I find in fact occurred, the Defendant has deliberately continued to cultivate the lands of the Deceased at Cocoa Mountain and at Very Vine that he knew did not belong to him, then he has no entitlement to the produce presently growing on them. They belong to the owners of the land on which he has been trespassing. Given the above findings, there will be judgment for the Plaintiffs for

(1) immediate possession of the lands of the Deceased at Cocoa Mountain and at Very Vine occupied by the Defendant;
(2) an injunction restraining the Defendant whether by himself, his servants or agents or howsoever from entering the lands of the Plaintiffs and committing any unlawful acts thereon;
(3) an order that the Defendant pay the sum of $4,500.00 being the balance of the amount agreed by him to be due for the produce sold from Cocoa Mountain between 1995 and 1998;
(4) damages for trespass to the Cocoa Mountain land subsequent to the year 1998 in the nominal sum of $5,000.00;
(5) damages for trespass to the Very Vine land in the nominal sum of $5,000.00;
(6) costs to be paid by the Defendant to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge