ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.305 OF 2000

BETWEEN:

VERINA JAMES

Claimant

and

ALSTON MCKENZIE

Defendant

consolidated with
CIVIL SUIT NO.318 OF 2000

BETWEEN:

ANNIE MC KENZIE
ALSTON MC KENZIE

Claimants

and

VERINA JAMES

Defendant

Appearances:

Emery Robertson for Annie Mc Kenzie and Alston Mc Kenzie
Joseph Delves for Verina James

- -
2001: August 16
2002: January 15, February 4
- -

JUDGMENT

[1] **MITCHELL, J**: This was a land dispute between a mother and son on the one part, and the daughter/sister on the other. The subject of the dispute was land

previously owned by the mother and now claimed both by the daughter and by the son to have been given to them by the mother.

[2] The case began on 24 July 2000 by the filing by Verina James of a generally endorsed writ and a summons for an interlocutory injunction against her brother Alston McKenzie. She claimed (1) a declaration that she is the sole owner of the land described in her deed No 1403 of 1981 as being one lot bounded on the north and east by Israel Pluto, on the west by Bulze, and on the south by land now or formerly owned by her mother Annie McKenzie; (2) an injunction restraining Alston McKenzie from entering her land; (3) a declaration that his deed No 1201 of 2000 transfers nothing, the grantor having divested herself of all her land in Belair prior to the execution of the deed; and (4) damages for trespass. In her affidavit of 24 July 2000 filed in support of her summons for the interlocutory injunction, she deposed that her mother Annie McKenzie had held title to a lot of land by a possessory deed No 521 of 1976; that on 24 April 1981 her mother had given her a deed No 1403 of 1981 for a portion of the lot described as above; that from the description it was obvious that her mother had given her all her land except for the portion on her southern boundary; that since 1981 her mother had transferred the remaining land to two sisters, Mercy Bowman and Elize McKenzie, or Elize's daughter Merlene Victory, in two separate conveyances, both of them having built houses on their portions; that she had lived on the land with her husband in their matrimonial home since about 1958; that all 5 of her children had been born there; that her brother Alston McKenzie had lived elsewhere in Old Montrose for the past 30 years; that on 24 March 2000 her mother, who was then some 94 years old, nearly blind, and enfeebled, had purported to give a parcel of land in Belair to Alston; that the deed had been registered as No 1201 of 2000; that it had described the land given as, "all that triangular lot piece or parcel of land situate at Belair . . . bounded on one side by lands of Mercy McKenzie on the second side by land of Elize Victory on the third side by land of Verina James and Israel Pluto . . .;" and, that on 26 and 27 June 2000 Alston had wrongfully entered on her land and had destroyed about 20 holes of peas and 10 palm trees; that on

28 and 29 June he had again wrongfully entered on her land and had picked a quantity of mangoes; that on 18 July he had wrongfully began digging up the land for the purpose of planting crops on it; that he had given her an ultimatum to move her latrine and her sheep pen and had said that he will destroy them if she did not do as he wished; that he had also threatened to shoot her whenever she asked him to leave the land; and, that the previous year he had struck her on her shoulder with a piece of steel causing injury.

[3] On 26 July 2000 Alston filed his affidavit in reply. He deposed that by deed No 1201 of 2000 he had become the owner of the land in dispute at Belair; that Annie McKenzie had formerly devised the same land to his sister Molly; that prior to making her Will of 9 August 1985 and a sketch attached to the Will his mother had divided her parcel of land amongst her children; that by an affidavit sworn to on 23 April 1997 by Verina James in suit No 364/1996 in which her sister Mercy was the defendant Verina James had stated that in the 1950s and 1960s her mother had informally subdivided her parcel of land into several lots and had given her one lot and had given her sister Molly another adjoining lot; that in the dispute over the access she had suggested to Mercy that she, Mercy, should make available a driveway to permit her, Verina, and Molly access to their lots; that Annie had never intended to give Verina land bounded by Bulze as set out in her deed and that the boundary description in Verina's deed had been a mistake as to do so was to have given away Molly's piece of land and would not have been in accordance with the earlier informal subdivision of the land; that Verina knew fully well that it had been a mistake and that she could not benefit from such a mistake under a voluntary conveyance; that the court would rectify the deed to conform with the common intention of the parties; that her mother had named Verina as the Executrix of her Will and had given her a copy of the Will together with a copy of the sketch; that these had been exhibited by Verina in yet another suit No 299/1999; that he had entered into possession of Molly's land; that Verina had first contended that the land was Molly's land and later denied that Molly had any land there; that he had requested that Verina remove a pigpen and an outside

latrine from off his premises; that he denied ever having threatened to shoot Verina; and, that Verina was being fraudulent and was not entitled to equitable relief. The perambulatory Will of Annie, who is still alive, was exhibited. This Will was made on 9 August 1985, just 4 years after Verina's deed. In it Annie stated that she bequeathed her land at Belair to her 3 daughters Mercy Bowman now residing in Canada, Elize Victory of Belair, and Molly Abraham also residing in Canada, less the lot of land granted by her to Verina by deed No 1403 of 1981. The sketch was exhibited to this affidavit. The sketch is very amateurishly done, and consists of a sheet of paper with names scattered about on it and with the cardinal points indicated showing that Verina had a lot to the north, Molly is to the south of her, and Mercy and Elise to the east of Verina and Molly.

[4] By an affidavit in reply filed on 31 July 2000, Annie deposed that she had voluntarily settled on each of her children Verina, Elize, Mercy and Alston a piece of her land at Belair; that the piece she had settled on Alston was the piece she had previously willed to Molly; that the boundaries to Verina's land were incorrect as she had never intended to give her any part of Molly's land; that Verina well knew that was never her intention; that Alston's deed also had a mistake in the description of his boundaries which she asked to be corrected; she asked for an early trial due to her age and health and because she would like to return to Canada as soon as possible and because Verina had not been truthful to the court. On 31 July 2000, an interlocutory injunction was granted to Verina restraining Alston from assaulting Verina or her husband or from entering upon the land in dispute.

[5] On 28 August 2001, after the trial had actually begun, Verina with leave of the court filed an affidavit in reply. In it she deposed that she had been given a power of attorney on 17 December 1981 which power of attorney had never been revoked; that in the power of attorney Annie had agreed "to confirm all and whatsoever my said attorney shall lawfully do or cause to be done by virtue of these presents;" that the right to bring the action for recovery of the disputed land

did not first accrue to Alston within 12 years before the commencement of the action and his right of action was barred by section 17 of the **Limitation Act, Cap 90**; that Alston and Annie were guilty of prolonged and inordinate delay in bringing this action and seeking the relief claimed and had thereby caused her, Verina, to believe, as in fact she did, that they did not intend to make the claim they were making and they had caused her to act to her prejudice; that by their conduct they had waived their right, if any, which was denied, to claim the relief they were claiming. This was the last affidavit on this file.

[6] Suit No 318/2000 commenced on 31 July 2000 with the issue of a generally endorsed writ issued by Annie McKenzie and Alston McKenzie against Verina. In it they claimed rectification or rescission of Verina's deed No 1403 of 1981; alternatively, an order that Verina reconvey to Alston the land known as Molly's land; and, an injunction restraining Verina from entering, crossing, occupying, or cultivating Molly's land. In his application for an injunction filed on 10 August 2000 he, Alston, repeated the matters he had claimed in the earlier suit; he further deposed that he was concerned that Verina might attempt to sell, mortgage, lease, exchange or transfer his piece of land to his detriment; he therefore sought an interlocutory injunction to restrain Verina from dealing in the title to the disputed land. On the same day, his mother Annie filed an affidavit in his support in which she repeated the facts she had deposed to in the earlier suit and expressed the same concern as Alston in his affidavit of the same day and similarly requested an injunction against Verina dealing in title.

[7] On 9 September 2000 Verina filed her affidavit in reply. The new information in this affidavit included that the land in dispute was 10 feet away from her house; that Annie was nearly blind and terribly enfeebled being unable to read or to walk on her own and that her memory was extremely flawed; that Annie no longer knew or understood what she was putting her signature to; that Annie was incapable of managing and administering her property and affairs and was a person under a disability.

[8] On 25 September 2000, Alston filed an affidavit in reply, essentially denying Verina's allegations. He exhibited an affidavit of Verina in suit No 364/1996 from which he had in an earlier affidavit quoted an extract. From this affidavit, which had been prepared by Parnell Campbell Esq, Verina's solicitor in that suit No 364/1996, it was evident that suit had involved a dispute between Verina and her sister Mercy over a common right of access to Verina's lot. It was in this affidavit that Verina had deposed that the disputed access had been given to her and Molly by their mother Annie since the 1950s; that Molly's lot adjoined her lot; that she had built her first house on her lot in 1958 after her mother had given her the piece of land; that in 1969 she had broken down the earlier thatched house and had built a board house on the spot; and, that in 1981 after her mother had given her the lot of land by deed No 1403 of 1981 she had broken down the board house and had erected a concrete house on the spot. From this affidavit, it was evident that Alston had sided with Mercy in the dispute over the right of way. The important point about this affidavit is that it constituted a statement on oath made by Verina as recently as the year 1996 that the land in dispute belonged to Molly and not to her as she was now claiming. Annie and Alston place great weight on this affidavit. On 29 September 2000, Annie and Alston were granted the injunction they requested restraining Verina from disposing of the land or from occupying it until after the trial of the action or further order.

[9] From the exhibits put in evidence at the trial, it would appear that Annie's 1976 possessory title had been prepared by Ronald C Jack Esq, while Mercy's 1991 and Merlene's 1996 deeds of gift from Annie had been prepared by Arthur C Williams Esq. The 1981 deed of gift of Verina, Annie's Will of 1985 and the 1996 affidavits sworn to by Verina in the 1996 law suit appear all to have been prepared by Parnell Campbell Esq based on instructions given to him principally by Annie and Verina. Alston's 2000 deed of gift had been prepared by Emery Robertson Esq and executed by Annie in Canada before Mercy's Canadian Notary, Mr Cossette.

[10] On 21 June 2001, the Master ordered the two suits to be consolidated and for the affidavits to stand as pleadings in the matter. No statement of claim or defence was ever filed in either of the two suits. The matter went to trial on the basis of the affidavits alone and any *viva voce* evidence produced at the trial.

[11] Following Annie McKenzie's and her daughter Mercy's return to St Vincent from Canada, the trial began in open court on 16 August 2001 during the long vacation to take their evidence. Annie testified that she was 95 years old. She was visibly enfeebled and had to be assisted to her seat by two persons. The court had to adjourn during her short testimony-in-chief to allow her a refreshment break. Annie's voice was so weak and low that, a microphone and amplifier not being available in Court No 2 where the trial had commenced, it was arranged for the court bailiff to stand next to where she was sitting and to repeat aloud her whispered words for all in the court house to be able to hear what she had said. She was adamant that she had in 1958 given Verina, Molly and Mercy only house spots on which to put their houses, a kitchen and a yard each; and that Molly had subsequently given her lot to Alston. There were many evident weaknesses, lapses and points of confusion in her testimony both as she gave her evidence-in-chief and later in cross-examination. At one point in her evidence-in-chief she said that she could not remember what the case in court was about; at another point she said she was not sure whether Molly had given her lot to Hayden or to Alston; she could not remember signing the deed for Alston while she had been in Canada the year before; in answer to one question she stated that she could not remember ever having made either a Will or the sketch that went with it; she said did not recall ever instructing Mr Campbell to prepare the deed for Verina; she answered at one point that she did not remember signing the deed for Verina; and, when shown the documents she said she was too blind to be able to identify them. In answer to another question in cross-examination, she said she could not remember when she gave Alston the lot of land, she said she thought it must have been before he went to live in town at Old Montrose and before he got married; at

one time she said she thought that she had given Molly and Alston different spots of land; at one point she said she did not recall if Molly had given Alston her lot of land; nor in answer to one question did she recall that at Elise's request she had given Elise's lot to Elise's daughter Merla. She admitted that when she had given Verina the land she had been younger and stronger and had been able to see and read and write properly. She appeared very concerned that Verina had acquired several acres of land adjoining the lot in question, though it later appeared that it was really Verina's daughter Ada and not Verina who had acquired the adjoining land. She thought that Verina's family had too much land and were now attempting falsely to claim Molly's lot. She admitted that Molly's lot and Verina's lot had been enclosed in one yard and had been occupied by Verina and her husband and family for many years. Accepting the testy and inconsistent way in which Annie answered some of the questions, I was satisfied that weak though her body was, her mind was clear enough; and, that she was opposed to Verina's interpretation of what had happened in regards to the transfer of title to the lands in question.

[12] Testifying in court on the same day as Annie McKenzie was Mercy McKenzie who was also about to return to Canada. She was Annie's daughter and Verina's sister. She also testified in the matter at this time during the long court vacation so as to save her having to return to St Vincent when the trial later resumed during the term. It transpired that Annie has been living in Canada with Mercy since the year 1978, visiting St Vincent with Mercy on holiday from time to time. Mercy testified that it was she who in the year 2000 had arranged for Annie to visit her, Mercy's, Notary in Canada to execute the deed for Alston. She testified that there had been the earlier 1996 case with Verina over the access road which case she and Verina had subsequently settled by her giving Verina a right of way "for peace's sake." It was in her testimony that the story of the adjoining 4-acre parcel of land purchased by Verina's daughter Ada came out. Much jealousy appears to have been engendered between Verina and Mercy by that acquisition. In her evidence Mercy showed great animosity towards her sister Verina. For example,

she thought that Verina had forced Annie against her, Annie's, wishes to make her, Verina, the executrix of her Will and had, similarly, forced Annie to give her, Verina, the title to the land in question. Mercy was adamant that the power of attorney Annie had given Verina had been forced from Annie. She was nonplussed when it was pointed out to her that Annie had executed the power of attorney in Canada before her, Mercy's, own Canadian Notary, Mr Cossette, from which circumstance it must follow that it was she who had taken Annie to the Notary to have the power of attorney witnessed, and that there was no way that Verina who was in St Vincent could have forced Annie to have signed it.

[13] The trial resumed on 15 January 2002. Alston testified first. He relied on his affidavits, and he was cross-examined by counsel for Verina. He is now 72 years of age. From his evidence it was confirmed that the land that Verina occupies, her lot and Molly's lot from the view of Alston, is one parcel of land with no separation between the two portions alleged have been given by Annie to Verina and to Molly. His evidence was that in about the year 1958, when he had assisted his mother in sharing out the lots among his sisters, his mother had instructed him to plant some sticks to mark the dividing lines, but those sticks had soon been destroyed by the animals of Verina that she allowed to range on the land. He was aware of Annie's Will of 1985 and the sketch that accompanied it. He was aware that Verina had occupied both lots from the earliest days, i.e., from about the year 1958, and had reaped and sold crops from the land. He suggested that it was Verina's husband Donald James, whom he refers to as her boyfriend, who had prepared the sketch. Alston testified that present on the land at the making of the sketch in the year 1985 were Mr St Aubyn Cato, Verina's solicitor, and Mr Campbell, Annie's solicitor. The presence of solicitors would suggest that there was a dispute, but there was no other hint in the evidence of there having been any family dispute in the year 1985, and I find that Alston must be mistaken about the date, he must be referring to some other dispute, perhaps the one in the year 1996. Alston explained that the reason why his name and his sister's Pearlina were not on the sketch or in the Will was that they had earlier been given by their

mother Annie title to parcels of land in other areas in St Vincent. Verina's version is that Annie had disinherited Pearlina because of Pearlina's ill conduct to her, Annie. This is a side show with which the court will not be concerned. Alston explained that Annie gave him Molly's lot in the year 2000 with the consent of Molly. He admitted that Verina had occupied the lot of land as she had described for many years and had cultivated the land for her own benefit. He also admitted that he had asked Verina to remove her animal pens and latrine from the land in question but that Verina had refused to do so. I am satisfied that he destroyed the crops and fruit trees in question as a result of his claim to the land.

[14] The last to testify was Verina. She was 66 years of age at the time she gave her evidence. Verina confirmed what she had deposed to in her affidavits. She claimed that she had had no trouble over her occupation of the land until the year 2000 when Alston turned up with a deed from Annie and claimed the lot that her mother had indicated in her perambulatory 1985 Will was intended for Molly and that he had destroyed the cultivation in question. On cross-examination by Mr Robertson as counsel for Annie and Alston, she testified that she was illiterate and could not read or write. She denied having sworn in the earlier 1996 affidavit that Molly's lot was adjacent to her lot and that Molly had the benefit of the right of way that was the subject matter of the earlier suit. She denied any knowledge of the 1985 Will or sketch. It was pointed out to her that in none of her affidavits was there an attestation clause that indicated that she had told the lawyers in question that she was unable to read or write, and that as a result someone had read out the contents of the affidavits to her and that she had appeared to understand the same and had agreed that the contents were true and correct. On balance, it being the observation of the court from the testimony given to the court by many witnesses over the past years that over 50% of the mature population of St Vincent is completely illiterate, there is nothing odd or surprising in the testimony of this witness that she is unable to read or write. There is nothing in the evidence or in the exhibits to suggest that she is not telling the truth in this regard. On the contrary, it would be very surprising to the court if more than half of the witnesses

in this case could do more than write their names. However, she raised the issue of her not being able to read and write at a very late stage, when she was the last witness to give evidence, and I find that nothing turns on this. She must accept responsibility for her own affidavit and for whatever consequences flow from it.

[15] The question is, was there or was there not a mistake in Verina's 1981 deed, was that mistake common to Annie and to Verina, and did Verina later come to know of the mistake and is now knowingly attempting to take advantage of it? Had there always been, from the year 1958, 2 lots of land one of which had been given to Verina and the other to Molly, and a mistake had appeared in the 1981 deed which mistake had been taken advantage of by Verina who was now pretending that she had been given the entire parcel of land in the year 1958? Or, had Annie from the beginning, in 1958, confirmed in the deed of 1981, given Verina the two lots as one parcel of land, and was Annie now, in siding with the siblings now in ascendance in her favours, in conformity with her sketch and perambulatory Will of 1985, claiming that one portion was Molly's and attempting to take away a portion of land that she had long previously given to Verina?

[16] The fact is, as I find it, that I believe Alston that in the year 1958 Annie gave Verina a certain lot of land and Molly another certain lot of land and she gave Alston instructions to mark out the boundaries of the lots that were to go to Verina and to Molly. Molly, however, never occupied her lot. The gift to Molly was never completed either by Molly going into possession or by Annie giving her a deed for it. Nor did Annie put anything concerning the gift to Molly into writing until the Will and sketch of 1985. These documents showed Annie's intention to devise the lot to Molly. The 1958 gift of the same lot to Molly had remained incomplete and Annie was free to revoke the gift at any time if she had ever wished to do so. As it was, she had in her 1985 Will confirmed her intention towards Molly. Verina, shortly after she occupied her lot, from the year 1958, had occupied Molly's lot as well and had cultivated it and had kept her small stock on it. This was still Annie's land, occupied by Verina with the permission of her mother Annie. I am satisfied

that Verina did not force her mother to give her the two lots of land in the deed of 1981; Annie had of her own free will given instructions to her solicitor while she was living with Mercy in Canada free of Verina's influence. Annie, as we have seen, had left St Vincent and had gone to live with Mercy in Canada since about the year 1978. Annie's instructions to her solicitor in 1981 had however contained a mistake, and the resulting description of the boundaries of the land in the schedule of the deed of gift to Verina had mistakenly included "Molly's lot" in the parcel being given to Verina who had, indeed, been occupying Molly's lot since 1958. The last page of Verina's deed of gift of 1981 is missing on the copy put in evidence, but it must have been signed by Annie on a visit to St Vincent with Mercy in that year. It was prepared by Annie's solicitor on her instructions and with the knowledge of Verina. I am satisfied that Verina must have known of the error in the schedule and known that her mother had never intended to give her Molly's lot. My belief that there was a common error is confirmed by the fact that just 4 years later Annie, on a subsequent visit to St Vincent in the year 1985, accompanied by Mercy, had her solicitor Mr Campbell prepare the Will, and she prepared or had prepared for her the sketch relating to her land at Belair, and appointed Verina as the Executrix of the Will. The multiplicity of solicitors used by Annie would not have helped in ensuring consistency. Annie was obviously on excellent terms with Verina at this stage and showed her confidence in Verina by appointing her the Executrix of her Will. I find it difficult to accept that Verina had no knowledge that her mother had made the Will, was not present when the sketch was made on the land as described by the witnesses, nor that she had been appointed Executrix of the Will. In that 1985 Will Annie shows what her intention had always been in regards to the land intended by her for Molly that she had unknowingly and mistakenly vested in Verina. There was no family dispute under way at that time for any malice to be suggested. Annie's Will, made when she was over 80 years of age, but able to see and to read, shows that her intention at all times was to leave the lot to Molly. I am quite satisfied that Annie knew that Verina had made use of it since 1958, but she was not aware that she had included it in Verina's 1981 deed. In about the year 1994, on another visit to

St Vincent with Mercy, Annie had fallen ill and had spent a year recovering with Verina. There still had been no family dispute at that time. In her affidavit in the 1996 lawsuit with Mercy, prepared by the same solicitor who had prepared Annie's 1985 Will, Verina had described the westernmost boundary of her land as being Molly's lot. She now claims that her solicitor did this without her instructions and without explaining it to her and without reading it to her. I think that it is more likely that her solicitor prepared the affidavit based partly on his knowledge of the land as given to him previously by Annie, and that would have included the concept of Molly owning the portion in question, and partly based on instructions from Verina. The family dispute had begun in the year 1996 when Mercy had built her home on her lot and had interfered with the access to Verina's and Molly's lots. I am satisfied that the solicitor had no reason to believe at the time that Verina was unable to do more than write her name. Verina, up to the year 1996, was unaware that Annie had mistakenly included Molly's lot in her deed, and she herself up to that time had no intention of claiming Molly's lot as her own. That situation changed only after the dispute with Mercy over the access, and after Alston had sided with Mercy in the dispute, and to add injury to insult, had himself vested with title to Molly's lot that Verina had been making use of all these years.

[17] Counsel for Annie and Alston submitted that:

(1) The evidence of Verina James showed that she was occupying more land than the house spot given to her by her mother Annie; the court ought to take into account what was the intention of Annie at the time she made the settlement of the lands on the children; there was no evidence of adverse possession by Verina, she never having laid claim to the lands in dispute until after Alston got his deed in the year 2000, and in earlier law suits she had acknowledged that Molly was the owner of the lot in dispute; the **Limitation Act** defence did not apply; mere acts of user were not sufficient to take title from the title holder unless these acts were inconsistent with the purpose for which he intended to use his land; Annie

McKenzie having constituted Verina her attorney by a power of attorney registered as deed No 8 of 1982, and that power of attorney not having been revoked until now, her acts of occupation of the land of Annie intended by Annie for Molly must be interpreted as acts of occupation by Annie;

(2) The court had power to rectify the deed of Verina when it did not fairly set out the common intention of the parties as expressed in the antecedent agreement;

(3) Where it was not sought to have a voluntary settlement set aside or rescinded, rectification may be appropriate to the extent that the voluntary settlement was inconsistent with and did not put into effect the settlor's intention;

(4) Where there was a unilateral mistake in his favour in a deed which was known to the other party who did nothing to correct it he would not be able to resist rectification on the ground that the mistake was unilateral;

[18] Counsel for Annie and Alston relied in his skeleton argument for his **Limitation Act** submission principally on the following authorities:

Hughes v Griffin an another [1969] 1 All ER 460
Leigh v Jack [the citation for which was not given, nor a copy provided to the court]
Cobb v Lane [1952] 1 All ER, 1199 [a copy of which was not provided to the court]

On the Rectification of Deeds submission counsel relied on the following authorities:

12 Halsbury's Laws of England 4th Edition para 1384 under the rubric **"Rectification"**
Spry's Equitable Remedies 3rd Edition page 378.

On the Voluntary Settlements submission counsel relied on the following authorities:

Re Butlin's Settlement Trusts [1976] Ch 251 at pages 261-262
Phillipson v Kerry (1863) 23 Beav 247.

On the Mistake in a Deed submission counsel referred the court to:

Egerton Payne v Adolphus Moses Lewis Civ App 5/1999 St Vincent [unreported].

[19] Counsel for Verina in his skeleton argument submitted that:

(1) His client held both paper title and possession of the land since 1958, long before the commencement of the suit in 2000, and Annie and Alston were barred by the **Limitation Act** from raising a claim to the land in dispute;

(2) Alston's admissions as to Verina's cultivation of the lot and reaping and selling of the crops for her benefit, and her refusal to remove her latrine and animal pen when he asked her to do so, were fatal to his claim to ownership of the land as it showed that Verina was in control of the piece of land with the necessary *animus* for more than the statutory period of 12 years.

He relied principally on the following authorities:

McKenzie v Duke of Devonshire [1896] AC 400

Saunders v Anglia Building Society [1970] 3 All ER 961

Sarding v Defreitas (1986) 34 WIR 97

Buckinghamshire County Council v Moran [1989] 2 All ER 225

Higgs v Nassauvian Ltd [1975] 1 All ER 95

12 Halsbury's Laws of England 4th Edition para 1330 under the rubric **"Reading Over"**

16 Halsbury's Laws of England 4th Edition para 1235 under the rubric **"Mistake in Language of Agreement."**

[20] In this case, I am satisfied that no question of *animus possidendi* arises from such acts of occupation as I have described above between the years 1958 and 2000 by Verina. The mere digging of a hole and putting up of an outdoor latrine, and the building of an animal pen, hardly amount to acts of occupation tending to show an intention to exclude the owner, her mother, Annie. Verina was never in exclusive occupation of the land, which was unfenced and bounded by the other lands of her mother Annie occupied by her sisters and her mother Annie whenever she visited St Vincent. Verina never intended to claim this lot of land as her own until after Alston appeared in 2000 with the deed from Annie and after relations had broken down with Mercy and Alston had sided with Mercy. Her possession only became adverse to Annie or Annie's successor at this point. No question of limitation arises. Despite the weaknesses and flaws in the answers given by Annie to some of the questions put to her at the trial, I was impressed with Annie's certainty on the main point in issue. I find that Annie never gave Verina Molly's lot in 1958. She never intended to give Verina Molly's lot in the 1981 conveyance to Verina, which she intended only to be a legal vesting in Verina of the lot she had informally given to her since 1958. Verina was at all times well aware that the lot belonged to Molly, and only raised a claim to it in about 2000 after Alston acquired title to it from Molly and Annie.

[21] Given the facts as found above, and the law produced to the court, I find that the deed of Verina registered as No 1403 of 1981 does not reflect the common

intention of the donor Annie or of the donee Verina. It contains an error in the boundary description in the schedule which can, accepting the warning of Lord Evershed MR in **Whiteside v Whiteside [1950] Ch 65** at page 71, quoted in **Sardine v De Freitas** [supra], that "rectification is a discretionary remedy which must be cautiously watched and jealously guarded," easily be rectified by granting the amendment to the schedule requested by Alston. There has been convincing proof produced of the common error in the description of the land given by Annie to Verina. There is no alternative remedy available. The error having come to the attention of Annie in the year 2000 upon Alston meeting resistance at that time from Verina, there has been no delay in bringing the application for rectification. Verina's deed if rectified as requested will accurately represent the true agreement of Annie and Verina at the time when it was executed. There will be judgment for Annie and Alston McKenzie in terms of claims 1 and 4 of their writ and for their costs to be paid by Verina McKenzie to be assessed if not agreed. Alston's deed No 1201 of 2000 is also amended in terms of the amendment prayed by Annie McKenzie in paragraph 7 of her affidavit of 31 July 2000 sworn and filed in suit 305/2000.

I D MITCHELL, QC
High Court Judge