ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2001

BETWEEN:

JOEL GUMBS

Appellant

and

[1] ADINA GARNES
[2] DENNIS HADAWAY

Respondents

Before:

His Lordship, The Hon. Sir Dennis Byron — Chief Justice
His Lordship, The Hon. Mr. Satrohan Singh — Justice of Appeal
His Lordship, the Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Emery Robertson for the Appellant
Mr. Richard Williams for the Respondent

2002: July 16;
2003: January 28.

JUDGMENT

[1] **BYRON, C.J.**: On the 11th day of April 2001, Mitchell J, QC, ordered the appellant to immediately give up possession of lands of the deceased David Gumbs in St. Vincent situate at Very Vine and Cocoa Mountain respectively and made consequential injunctive and financial orders.

Background Facts

[2] The deceased David Gumbs had lived and worked in the United Kingdom before returning to St. Vincent in his retirement. On November 1, 1991 he made his last will and testament appointing Dennis Hadaway, Adina Garnes and Christa Kirby

as executors of his will. In that will he devised a parcel of land approximately twenty-one and three quarter acres situate at Very Vine to a group of 10 beneficiaries and a parcel of land of approximately seven acres at Cocoa Mountain to a group of 8 beneficiaries. The deceased died on the 26th of March 1995, and his will was admitted to probate on the 7th of July 1995. No title documents were tendered in evidence in relation to either parcel of land.

[3] The learned trial Judge found that prior to his death the deceased had made an arrangement with the Appellant, who is a successful planter of various lands, to plant the deceased's land at Cocoa Mountain and to share the proceeds with the deceased. They were first cousins, and the appellant used to take him to a clinic three times a week for treatment to a badly infected sore on his foot.

[4] The dispute developed when the first Respondent, as executor of the deceased's estate, went to the Appellant in 1995 to discuss accounting for the estate's share of the profits of the said land and the Appellant denied that he had any obligation to account. The Appellant claimed that this land originally belonged to his father, and when his father died in 1975, he continued working the land as owner. He denied the existence of any arrangement with the deceased. Mr. Arthur Williams, solicitor for the estate, wrote the Appellant giving him notice to quit the Cocoa Mountain land. Mr. Williams testified that the appellant subsequently visited his offices in 1995 and requested a lease of the Cocoa Mountain land from the executors. After consulting with the executors Mr. Williams, on their instructions, wrote the Appellant to indicate that they were not interested in leasing the land. It is important to note that the learned trial Judge found that at the time of these meetings the appellant was not as yet occupying the Very Vine Lands. The Appellant did not vacate the Cocoa Mountain land. He subsequently entered on and commenced cultivating the Very Vine land.

[5] In June 1998 the writ which commenced this action was issued. The Appellant entered an appearance to the writ through his solicitor, Mr. Grafton Issacs.

Instead of filing a defence, the Appellant personally contacted Mr. Williams and asked him to set up a meeting with the executors. This meeting took place on the 15th of October 1998, at the chambers of Mr. Williams who was present with the first Respondent. The Appellant attended with his brother and a solicitor, Mr. Howard. At that time the Defendant requested time to leave the Coco Mountain Land. The learned trial Judge found that an agreement was reached at that meeting. In exchange for the estate giving him one year, until the 15th of October 1999, to reap his crops and vacate the lands of the Deceased, the Defendant agreed to pay the estate $5,000.00 dollars for the estate's share of the produce reaped from 1995 to the 15th of October 1998, and one-third of the profits for crops reaped between the 15th of October 1998 and the 15th of October 1999. He agreed to pay the sum of $5,000.00 by monthly installments of $500.00 dollars, the first installment being due on 15th November 1998. On the 4th November 1998, the appellant attended the chambers of Mr. Williams and paid the first installment of $500.00 dollars, and took away a written draft of the agreement in order to check it before signing. He has never signed that document nor made any further payments on the agreement. The proceedings were reactivated and eventually came to trial.

Grounds of Appeal

[6] The appellant contended:

[i] That the learned trial Judge was wrong to overrule preliminary submission that all executors are necessary parties to the litigation.

[ii] The decision was based on the wrongly admitted "without prejudice" evidence of Arthur Williams.

[iii] That the decision as to the ownership of the land in dispute was against the weight of the evidence.

[iv] That appellant had continuous possession of Coco Mountain for over 12 years.

[v] The learned trial Judge failed to consider whether there was tenancy of Very Vine and Coco Mountain whether it was properly determined.

[vi] The learned trial Judge misdirected himself in making the financial orders that he did.

Necessary Parties

[7] The learned trial Judge, with cryptic reference to the rules of court Order 15 and the 1970 White Book paragraph 15/14/8, rather summarily rejected the appellant's preliminary objection that the proceedings were null because of the three executors only two were parties to the case.

[8] In **Werderman v Societe General d'Electricite** (1881) 19 Ch.D. 246 Jessel M.R. said at 250:

> " as far as the rules go there is no power of demurring for want of parties"

Williams and Mortimer on Executors Administrators and Probate 3rd edition at 995:

> "**Misjoinder of parties**. No cause or matter is defeated by reason of the misjoinder or non-joinder of parties. The court has power, of its own motion or on application, to order that the names of parties improperly joined should be struck out, or the names of parties who ought to have been joined should be added. But no person may be added as a plaintiff without his written consent. The only objection which a defendant can take to the non-joinder of one of two or more executors as plaintiff is to take out a summons to have him joined as plaintiff. The necessary facts and interest should be shown by affidavit in support of the application."

CPR 2000 makes similar provision for joining new parties in Part 19.

Without Prejudice

[9] The most important evidence in the case was the evidence of the meeting at the chambers of Mr. Arthur Williams. The learned trial Judge relied on it to assist in his fact finding. In his judgment after discounting reliance on much of the unsupported claims he said:

> "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 respondents)."

[10] The appellant contends that the evidence is inadmissible because it constitutes "without prejudice" negotiations between the parties to a dispute. The appellant referred to **Buckinghamshire v Moran** (1990) Ch 623. This case was hardly relevant because it examined whether correspondence under "without prejudice" notation could be privileged from admission if it did not amount to an offer to negotiate but was merely an assertion of rights. The submission was put in unusual circumstances. There was no allegation in the pleadings that these discussions were "without prejudice". The appellant in this testimony never alleged that. What he alleged in evidence was that the money he agreed to pay was for the very vine land and not for Coco Mountain land.

[11] There was no evidence of any "without prejudice" correspondence nor was there any evidence that any one had said or done anything to draw it to the attention of any other person that they were involved in negotiations that were without prejudice. The learned trial judge, however, decided the issue on the point that he found that there was a concluded agreement which bound the parties in relation to the matters in dispute in the case and that evidence of the agreement was admissible. In so doing he was in ancient and good company on a well settled principle. In **Tomlin v Standard Telephone** (1969) WLR 1379 at 1382 Dankwerts L.J. relying on dicta of Lindley L.J., from a case in 1889, said:

> "A point which arises is that all the letters written by the agent of the insurance company bore the words "without prejudice". The point is taken that, by reason of those words, there could not be any binding agreement between the parties, and it was said, indeed, on behalf of the defendants that the letters were not admissible. I feel no doubt, as the judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence.

> The judge quoted a stated by Lindley L.J. which really was no more than a dictum in the case in question but seems to me to have great force and to be of great importance with regard to the present case. This was in **Walker v Wilsher** (1889) 23 Q.B.D. 335. When the case is looked at, it appears that, in fact, the decision was that the letters in question should not have been looked at for the purpose of the case at all, and consequently the judge in the court below had been at fault in relying upon them for the purpose of depriving the party of his costs. In the course of his judgment, however, Lindley L.J. said, at p.337:
>
> > "What is the meaning of the words `without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."
>
> That statement of Lindley L.J. is of great authority and seems to me to apply exactly to the present case if, in fact, there was a binding agreement, or an agreement intended to be binding , reached between the parties, and, accordingly, it seems to me that not only was the court entitled to look at the letters, though they were described as "without prejudice", but it is quite possible (and, in fact, the intention of the parties was) that there was a binding agreement contained in that correspondence. This disposes of the first point."

Ownership of the Land in Dispute

[12] Ownership of land at Cocoa Mountain. Counsel for the Appellant submitted that the learned trial Judge's finding that the land of Coco Mountain belonged to the deceased and that the Appellant occupied the said land by license from the deceased was against the weight of the evidence. The appellant gave evidence that the land had belonged to his father who died in 1975 and he has been in occupation since then. There was no evidence of the acquisition of the land. No title documents of title were put in evidence to support the claims of ownership of either side. The will, at least, evidenced that the deceased claimed to be the owner of the land devised, and the judge stated that he did not believe that given the good relationship between the deceased and the appellant that the deceased would have concocted a false claim, to land he knew to be the appellant's, shortly

before his death. The appellant was unable to produce anything to support his bare allegation.

[13] This was an aspect of the case on which there was very cogent evidence amounting to an admission by the appellant. The Judge relied on the testimony relating to the meeting that took place at Mr. William's office on 15th October 1998. The fact that the meeting took place on that day was admitted by the appellant who stated that he was accompanied by Mr. Howard, his lawyer, and his brother John Gumbs. Evidence of what transpired at the meeting was given by the first Respondent, Mr. Arthur Williams and the appellant. Neither John Gumbs nor Mr. Howard testified at the trial. Adina Garnes said:

> "The agreement in short was that Joel Gumbs was to leave the land by the 15th of October 1998, he was to pay some money. He agreed on the sum of $5,000.00 dollars for what he had already reaped on the land at Coco. He was to pay one-third of what he presently had on the ground and to vacate the land. This money was agreed upon for the Coco land only. The one-third payment was to include the lands at Coco and Very Vine."

[14] Mr. Williams in his evidence stated:

> "At the meeting we discussed how much money he should pay for his occupation of the land form 1995 to 1998. That was the Coco land. They were not discussion without prejudice. They suggested payment for the period. Their side suggested $5,000.00 dollars for the three years. Mrs. Garnes objected vehemently. She said he was reaping truckloads from the land. In the spirit of compromise, I convinced her to agree to the $5,000.00 dollars."

[15] The Respondent admitted that at the meeting he entered into an agreement to pay the $5000,00 as alleged but denied that the payment related to the Coco Mountain Land. He stated that it was for the land at Very Vine. Resolving this conflict was a matter of credibility. The area of conflict between the two stories was in fact very minimal. In addition the learned trial Judge would have been mindful of other evidence adduced by the appellant relating to his entry into possession of the Very Vine Land which was inconsistent with his allegation of entering into an arrangement to pay for its occupation between 1995 and 1998. The learned trial

Judge having preferred the evidence of the respondents on this matter believed that the appellant had entered the agreement as alleged in the testimony of the respondents' witnesses. I can think of no good reason to overturn his finding of this fact. The importance of this finding is that from it the judge was entitled to infer that the appellant was acknowledging not only the ownership of the deceased but the agreement to share his earning from the cultivation of the land.

[16] There clearly was ample evidence to support the finding that the learned trial Judge reached on the question of the ownership of the Cocoa Mountain Land.

Ownership of land at Very Vine

[17] In his judgment a paragraph 24 the learned trial Judge said:

> "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."

[18] The appellant contended that there was on evidence to support this finding. In my view the judge's conclusion were inferences he drew from the appellant's own testimony. The appellant in his testimony in chief gave evidence:

> "I know where he (the deceased) had lands at Very Vine. I was given permission to go on the Very Vine land. I got permission about 8 years ago."
> "I have no problem with giving up the Very Vine land. While this was going on I got a letter from Mr. Williams. I complained to Granville Gumbs and Nato Gumbs. I knew that they were beneficiaries of the land. Granville Gumbs took me to Mr. Williams…. I told him that Granville Gumbs and Nato sent me there to continue to work the land."

[19] On this testimony the appellant was admitting on oath that the deceased was the owner of the land at Very Vine and he made two allegations, one that the deceased gave him permission to go on the land and the other that beneficiaries of the estate sent him on the land. The learned trial Judge's finding of the primary fact that the deceased was the owner of the land was supported by the admissions of the appellant. The inferences he drew as the motive for going on the land were

on the finding that the learned trial Judge found as a fact that the appellant went on to the Very Vine, only after the meeting with Arthur Williams refusing to leave the Cocoa Mountain Land, when Granville and Nato sent him there. There was direct evidence from the first respondent who testified that it was only after the meeting, when she returned to Barbados where she lives, that the appellant went on to the land at Very Vine, and it was in 1998 that she saw him planting the land for the first time. The learned trial Judge believed this testimony as he was entitled to. The finding that the deceased was the owner of the land was supported by testimony of the Appellant himself.

Adverse Possession

[20] The appellant's contentions that he is entitled to a declaration that he has prescribed the land at Cocoa Mountain by virtue of his adverse possession could not be sustained. The learned trial Judge found as a fact that the Appellant's possession or occupation of the Coco land prior to the death of the deceased was permissive on the basis of sharing the profits of the crops. This finding was further supported by the Judge's acceptance of the evidence that the Appellant agreed to pay a share of the profits from land for the period 1995, when the deceased died to 1998 the date of the agreement. There was absolutely basis on which the findings of fact could be overturned. There is no merit to this ground of appeal and it has to be rejected.

Whether Tenancy of Very Vine Land and Coco Mountain Land was Properly Determined

[21] The Appellant put forward the proposition that if the learned trial Judge was right in his conclusion that the respondents were entitled to declarations of ownership they were not entitled to an order for possession because the appellant was a tenant and entitled to six months notice under the Small Tenements Act. He contended that the evidence that Mr. Williams served a notice to deliver possession in three months was evidence of liability to give notice but the statutory period was six

months and the notice was therefore invalid. The findings of the learned trial Judge were based on an evidential basis which the appellant could not rebut.

[22] In relation to the Very Vine land, the judge accepted the evidence of the appellant that he was sent to the Very Vine land by Granville and Nato Gumbs after the death of the deceased and that his occupation of that land commenced after the respondents refused him a lease of the land at Cocoa Mountain. Both Granville and Nato Gumbs were among the devisees for that property in the will of the deceased. There was no evidence that the executors transferred any interest in the land to the beneficiaries nor did they authorize them to put the appellant in possession. The evidence is just the opposite, because it was while the executors were attempting to gain possession of the land of the deceased that these two beneficiaries entered into an arrangement with the appellant whose interests were inconsistent with those of the estate. The legal principle is basic. The property of the testator devolves to the personal representatives of the estate until it has been vested in the beneficiaries. The invalidity of the action of Granville and Nato, and its ineffectiveness to pass any legal interest is clarified by Williams and Mortimer 3rd edition page 849:

> "Until assent or conveyance, a beneficiary has an inchoate right transmissible to his personal representatives. He cannot, however, without the authority of the personal representatives, take possession of the property, even though the testator expressly directs that he shall do so; otherwise a testator might appoint all his effects to be taken in fraud of creditors. Should he go into possession the personal representatives may sue him in ejectment, trespass or trover, according to the circumstances."

[23] The learned trial Judge was therefore quite right when he concluded that the appellant was a trespasser because the persons who put him in possession did not have the legal authority to do so.

[24] The land at Cocoa Mountain. The submission that the appellant could be a tenant in relation to the land at Cocoa Mountain did not have any evidential basis. In his pleadings the appellant was alleging that he was an owner of the land and not a tenant. In his evidence the appellant did not claim to be a tenant, he alleged that

he was the owner of the land having been in occupation as owner since 1975 when he took over his father's occupation of the land. It is true that the learned trial Judge did not believe these allegations and rejected them. The evidence which the learned trial Judge accepted was that the Appellant did have an arrangement with the deceased for the use of the land on terms and that after his death he entered into an agreement with the respondents to surrender possession on terms. Instead he established some links with the beneficiaries of the estate and broke the arrangement. His continuation in possession in those circumstances was certainly not on the basis of a tenancy arrangement and the learned trial judge was right to categorise him as a trespasser who did not require notice.

Damages

[25] The basis of the financial orders. The appellant submitted that there was no legal basis for the financial orders made by the learned trial Judge. In my view all the orders were supported by legal principles and the evidence. The order made by the learned trial Judge in relation to the payment of $4,500.00 dollars is based on the agreement of the appellant. The learned trial Judge found that the appellant had agreed to pay $5,000.00 for profit share between 1995 and 1998, and he had paid $500.00 on account. The balance due is $4,500.00.

[26] The other financial orders were for general damages for trespass to agricultural land which produced a benefit to the appellant without doing any damage to the respondents. The measure of damages would be the price a reasonable person would pay for the user of the land. In this case the respondents had alleged an arrangement for sharing profits in regard to the Cocoa Mountain land and that would have been a reasonable basis for the assessment of damages if the profits could be ascertained.

[27] Although the learned trial Judge used the term "nominal" to describe his award of $5,000.00 damages in relation to each of the parcel of lands of Coco Mountain

and Very Vine, he explained quite clearly in his reasons, that the Appellant was not keeping any records and it would have been futile to order him to give an account for his earnings over the past five years. The sum of $5,000.00 dollars was an estimate based on the Defendant's own admission that $5,000.00 was a fair sum for the period 1995 and 1998. In my opinion the learned trial Judge was entitled to draw an inference from the evidence. The inference is rational. The alternative would have been to make an order requiring additional court hearings which could hardly have produced an accurate accounting. I have concluded that the order made is sustainable on that basis. In the end there is no merit in the appeal and it must be dismissed.

Costs

[28] At the close of the appeal hearing I asked counsel for assistance on the order for costs that should be made. Counsel seemed to agree on $5,000.00 as an appropriate award on appeal. The trial ordered that the costs for the trial should be taxed if not agreed. I would order a proportion sum of $7,500.00 for the costs of the trial.

Order

[29] I accordingly order that the appeal is dismissed with costs to the respondent in the sum of $5,000.00, and order that the order of the court below be varied to include an order of costs in the sum of $7,500.00.

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]