

IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
DOMHCV 75 OF 2009

BETWEEN:-

CELINA GEORGE

By her duly authorized

Attorneys Anthea George,

Andrew McDonald Charles

And Pauline Mason Brandt

CLAIMANT

AND

VALENTINE GRAHAM

1ST DEFENDANT

FEDORA CHARLES

2ND DEFENDANT

KEMANY MITCHELL

3RD DEFENDANT

MATTHEW GRAHAM

4TH DEFENDANT

JANET GRAHAM

5TH DEFENDANT

ST HILAIRE NATION

6TH DEFENDANT

URVIN SERAPHINE

7TH DEFENDANT

WILLIAM CHARLES

8TH DEFENDANT

Before: The Hon. Madam Justice M E Birnie Stephenson

Appearances:

Mrs Gina Dyer Munro of Dyer & Dyer for the Claimant

Mr William Riviere for the Defendants

2019: January 31

November 26

Judgment

[1] **Stephenson J.:** On the 9th March 2009 the claimant filed a claim form¹ with a statement of claim making the following claim against the defendants:

- a. a declaration that the defendants are not entitled to be and remain in possession of the claimant's land located at Tranto, Castle Bruce in the Island of Dominica;
- b. that the defendants deliver up possession of the said land registered in Book of titles G6 Folio 45;
- c. possession of all the land registered in Book of Titles G6 Folio 45;
- d. an injunction to restrain the defendants whether by themselves or their servants or agents or otherwise however from being or remaining in possession of or entering upon the claimant's land registered in Book of Titles G6 folio 45 or in any way whatsoever interfering with works on the Claimant's said land registered in book of Title G6 Folio 45;
- e. damages for trespass;
- f. costs;
- g. interest at the rate of 5% from the date of judgment;
- h. further or other relief
- i. mesne profits at the rate of EC\$6,250.00 weekly until possession is delivered up to the claimant.

In Limine application to dismiss the defendants' case:

[2] In the opening salvo of her closing submissions Learned Counsel Mrs Dyer Munro on behalf of the claimant sought to have the court strike out the defence and counterclaim filed by the defendants on the grounds that they failed to plead the Real Property Limitation Act² ("RPL Act") more particularly section 33 as is required, if they desired to rely on the limitation defence.

¹ Page 1-8 of the trial bundle number 1 filed on the 24th April 2015

² Chapter 54:07 of the Laws of Dominica

- [3] Counsel stated that the “*The defence has not been sufficiently pleaded to engage the court*” and “*that in the circumstances the court is “duty bound “to disregard the defence and counterclaim and enter judgment for the claimant’*. Learned Counsel cited **Olivia Donovan Carty et anor –v- Rosalie Donovan and another**³ in support of her contention, counsel relied on the words of Foster J when he said “... In any event, the limitation plea is a defence that has to be pleaded in the Defence. It is a shield and not a sword, as is the action for prescriptive title.”⁴
- [4] Learned Counsel Dyer Munro submitted that if the defendants in the case at bar wanted to raise the issue of adverse possession, which is a fact of the limitation defence it ought to have been specifically pleaded and having not done so they cannot now seek to avail themselves of that defence.
- [5] It is necessary to have a brief review of the matter’s procedural history in an effort to deal with this *in limine* application.
- [6] A claim form with statement of claim was filed in this matter on the 9th March 2009, there were some interlocutory injunctive proceedings filed and, on the 5th November 2009,, an amended statement of claim was filed by the claimant. On the 21st July 2010 an affidavit of service was filed and sworn to by Natasha Adrien Scotland averring that she on the 20th July 2009 served on the chambers of Counsel for the defendant an amended Statement of Claim and an amended Fixed Date Claim form.⁵
- [7] On the 6th November 2009 there was an order of Court where Justice Cottle granted leave to the defendant to file and serve their defence on or before the 20th November 2009.
- [8] On the 10th November 2009 a defence and counterclaim to the amended statement of claim was filed. On the 1st March 2010 a reply to defence and counterclaim to amended statement of claim was filed by the claimant.

³Claim # BVIHCV 2006/0316

⁴ Ibid paragraph 27

⁵ It is noted that there is no amended fixed date claim form in the trial bundle. There is a claim form with statement of claim and an amended statement of claim.

[9] Another statement of case entitled defence and counterclaim was filed on 30th July 2010 on behalf of the Defendants.⁶ Witness statements were filed and there was a trial of the matter. Thereafter there was disclosure and exchange of documents followed by Pre-Trial Memoranda filed by both sides.

[10] The matter came up for trial before Thomas J January 2014. In May 2014 the claimant was granted relief from sanctions and her witness statements and witness summaries filed out of time were deemed properly filed.

[11] The matter was eventually tried by this court as currently constituted ending in July 2017 and closing submissions were ordered. Shortly after the end of the trial in 2017, Dominica was subjected to the monster Hurricane Maria thereby bringing a halt to work on the island including the court and chambers of the various legal practitioners. The Court's file was destroyed. The Closing submissions on behalf of the defendants were finally filed on 31st January 2019.

[12] There is no evidence of any application made by the claimant to strike out the defendant's defence until in her closing arguments after trial. Can this be done at this stage?

[13] The claimant in this case is asking for the defence to be struck out and judgment entered against the defendants, this would in effect be an application for summary judgment. She has not complied with the requirements of Parts 15 and 26 of CPR. Part 15.4 and 15.5 makes provision for procedure for the making of such an application⁷.

[14] In denying this application, it is noted that this application is by Counsel in her closing submissions which is long after there has been case management and pre-trial review. I am moved to say that it would be unfair and unjust to the defendants for this application to be even entertained at this stage, as this would be tantamount to trial by ambush which CPR 2000 seeks to eradicate by virtue of the various case management steps to be taken before arriving at closing submissions after trial and more particularly to the provision of Parts 15 and 26.

⁶ Pages 107 - 111

⁷ See Daniel Andrew Dubissette –v- Grenada Cooperative Bank Ltd FDAHCA 2009/0012

[15] Even if the court were to entertain Counsel Mrs Dyer's Munro's application she would not succeed for the following reasons. CPR 26.3(1)(a)⁸ gives the court a discretion to strike out a statement of case or part thereof where it appears to the court that there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings. It is a well-established principle that this power should only be used sparingly. (emphasis mine)

[16] The law in relation to striking out a statement of case on the ground that it does not disclose a defence is guided by well-established settled opinion which states that such an order should not be granted unless the defence is totally without merit in relation to the claim. However, if there is some evidence or law on which the party can rely to mount a claim or defence, the statement of case should not be struck out. Indeed, it is necessary to look at the intrinsic justice of the particular case in light of the overriding objective: **Walsh v Messeldine**⁹ In my view the nature of the defence as adduced by the defence is worth the while examining.

[17] In the case at bar the defendants seek to rely on the fact of possession they have sought to establish those facts through viva voce evidence and every single one of them who gave evidence were thoroughly cross examined by counsel for the claimant. Therefore, the question is why now after many days of trial even which was held a different location to accommodate the claimant should the claimant's counsel seek to utilise the summary nuclear weapon in the arsenal of combat in the court room known as litigation?

[18] In the circumstances this court will not accede to Counsel's application and this court will review the evidence as adduced by both sides to make finding of fact and apply them to the law as it relates to the case at bar.

THE ISSUE

[19] It is this court's view that the sole issue to be determined in this case is whether or not the claimant's title to the disputed parcels of land has been extinguished in part by the defendants' continuous undisturbed possession of various parcels.

⁸ Civil Procedure Rules 2000 ("CPR")

⁹[2001] CLPR 201, C. A (UK)

[20] The court has reviewed the quite lengthy submissions filed by both counsel in this matter. Reference will be made to those submissions which were considered necessary to explain the court's conclusions. It is to be noted that failure to make specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. Similarly, a good many issues of and points have been raised by both counsel which in the court's view is not necessary to discuss in order to resolve or to decide the main issue in the case at bar.

The documentary ownership of the land:

[21] The claimant relies on the documentary evidence that she is the registered owner of the land registered in Book of titles G6 Folio 45. comprising 73.0 Acres and bounded as follows:

North: By the Sea;

East: By the Sea;

South: By the land of Branche Laudat:

West: By the land of Patrick Joseph, Mc Donald Charles, Murray Graham and Mossington Graham

[22] In her Pre-Trial Memorandum¹⁰ filed on the 30th May 2014, the claimant states that at all material times she was the owner in possession of the land subject matter of this case. The claimant says that she obtained her Certificate of Title on 13th August 1985.

[23] The claimant says that Mr Henry Bannis was her agent and overseer who was in charge of the land and he gave permission to some of the defendants on her behalf to occupy parts of her land. Briefly her case against each of the defendants is as follows:

Name	Defendant	Status (How they occupy the land)
Valentine Graham	1 st	As a Licensee
Theodora Charles	2 nd	As a Licensee
Kimani Mitchell	3 rd	As a trespasser – he entered the land in or

¹⁰ Pages 155 to 159 of Trial Bundle number 1

		around 2008
Matthew Graham	4 th	With the permission of Mr Bannis and has since remained on the property unlawfully
Janet Graham	5 th	With the permission of Mr Bannis and has since remained on the property unlawfully
St Hilaire Nation	6 th	With the permission of Mr Bannis and on the 7 May 2009 he signed a document agreeing to vacate the claimant's land.
Urvin Seraphine	7 th	Nothing is mentioned about the 7 th Defendant in the Pre-trial Memorandum
William Charles	8 th	With the permission of Mr Bannis and vacated the land but has since returned to the land and resumed occupation on the property unlawfully

[24] The claimant contends that the defendants are all trespassers and are in wrongful possession of her land and that they have refused to vacate same. She says that as a result of their actions she has been deprived of the use and enjoyment of her land and has suffered loss and damages. In the circumstances of the case the claimant is seeking possession and damages for the said loss of use and enjoyment of her property.

[25] The defendants deny that the claimant is the owner of the portions of land as claimed and they all contend that they have been in occupation of same and have been also in continuous and undisturbed possession of the land. A review of the defence and counterclaim to the amended statement of claim and evidence adduced shows that the defendants claim to be in possession of the following parcels of land and from the following dates:

Name	Defendant	Parcel	Date of occupation to the 9 th March 2009 the date the civil proceedings were commenced
Valentine Graham	1 st	1.623 acres	1978
Theodora Charles	2 nd	1.652 acres	1964
Kimani Mitchell	3 rd	1.107 acres	2000

Matthew Graham	4 th		
Janet Graham	5 th	2.684 acres	1985
St Hilaire Nation	6 th	2.462 acres	1950's
Urvin Seraphine	7 th	5.182 acres	1990
William Charles	8 th	3.535 Acres	1980

[26] In their defence the defendants all state that the claimant obtained her Certificate of Title by fraud in that the claimant knew or ought to have known that portions of land contained in the Certificate of Title were occupied and that she still went ahead and applied for First Certificate of title knowing that she tendered affidavit evidence to the contrary in support of her said application.

[27] Save and except for Kimani Mitchell ("Kimani") the defendants all more or less say they entered onto the land as squatters without the permission of the owner with the intention of dispossessing the lawful owners and their successors in title and making their holding their own. Kimani essentially contends that he entered the land in 2000 following on the continuous and undisturbed possession of his uncle Alphonse Graham and thereafter he continued in undisturbed and continuous occupation to the 9th March 2009.

[28] In their Pre-Trial Memorandum the defendants claim that there is no evidence of a written licence or lease agreement or any written receipt of monies paid to the claimant or her agent by any of them either personally or on their behalf.

[29] The claimant in her reply and defence to counterclaim denies that the defendants were in undisturbed and continuous occupation as they claim. She also denies obtaining her Certificate of Title by fraud as alleged by the defendants. The claimant in a lengthy reply to the defence filed traversed *verbatim et seriatim* each and every claim made by each and every defendant with some detail.

The Counterclaim

[30] In their counterclaim the defendants at paragraph 2 all seek an order from this court that the “Registrar General” states a case conferring title by adverse possession in the name of the defendants for the portions of land to which they seek to lay claim to. I propose to strike out this part of the counterclaim as a matter of law for the following reasons.

- a. The “Registrar General” is at law incapable of stating a case as it regards lands in Dominica, The Registrar General means the Registrar of Births and Deaths ¹¹and he is not clothed with the power and or jurisdiction to do as requested by the defendants.
- b. Section 33 of the Title by Registration Act provides the procedure by which a claim to a title acquired by prescription in respect of registered land is to be made, the defendants in their counterclaim has not and cannot invoke section 33 at this stage.

[31] It is noted that the defendants in their closing submissions sought to withdraw their counterclaim. This is not in compliance with the procedure as set out in part 37 of CPR 2000. A notice of Discontinuance of the counterclaim has not been filed or served on the claimant and therefore the attempt to discontinue the counterclaim at this late stage in the written submissions is wholly irregular and will not be granted. The counterclaim is therefore struck out with costs to be assessed to the claimant.

The Law

I. Indefeasibility of Title

[32] It is the well-established law in Dominica that the claimant being the registered owner has indefeasible title to the property¹² subject to exceptions as is stated in statute.

¹¹ See Interpretation Section of the Registration of Births and deaths Act Chapter 35:30 of the Laws of Dominica

¹² Section 8 of the Title By Registration Act Chapter 56:50 (TBR Act) of the Laws of Dominica which states “All certificates of title granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible”

[33] The word Indefeasible has been defined in the first schedule of the Title By Registration Act (The TBR ACT) as

*“The word used to express that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are not mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of the certificate of title, or the noting of the mortgages or incumbrances, **or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Act, by the person making the challenge.** The word also means that, the certificate of title being issued by the Government, the Government is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by its issue to bring an action for money damages against the Government” (emphasis mine)*

[34] Section 10 of the TBR Act further provides that

“The right of the registered proprietor named in a certificate of title to the land comprised in a certificate of title granted under this Act shall be the fullest and most unqualified right which can be held in land by any subject of the State under the law of Dominica, and such right cannot be qualified or limited by any limitations or qualifications in the certificate of title itself ...

II. Adverse possession

[35] Our court of appeal has held that *“Adverse possession can only arise where it is recognised by the adverse possessor” that the paper title is vested in someone else. In essence, the adverse possessor seeks to say that he has dispossessed the paper owner.”*¹³

[36] The key to this case lies in section 2 of the Real Property Limitation Act (RPL Act)¹⁴ which provides

¹³Arnold Celestine (Administrator of the Estate of O’Ferril Celestine) –v- Carlton Baptiste HCVAP 2008/011 Grenada at paragraph 12

“(2) After the commencement of this Act, no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to some person from whom he claims; or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same.”

[37] The provisions of the RPL Act which is the same as the Grenada legislation, save for a few words, was examined by the Court of Appeal in the Grenada case of **Arnold Celestine (Administrator of the Estate of O’Ferril Celestine) –v- Carlton Baptiste**¹⁵.

[38] Chief Justice Janice Dame Pereira who at that time sat as Justice of Appeal delivered the concurred judgment of the Court of appeal said *“The whole purpose of such statutes growing out of public policy considerations and well recognized over many years, was to bar stale claims, or, put another way, they are designed to encourage the timeliness of claims.”* ¹⁶

[39] *The learned Honourable Chief Justice went on to opine that*

“On a proper construction of these sections of the Limitation Act, it becomes clear, in my view, that these provisions do no such thing. It appears to have been overlooked that these provisions are directed at the right of the paper owner to bring a claim for recovery of land and limit the time frame within which the paper owner may do so. This deals with the circumstances in which the right to bring an action for recovery is deemed to have accrued. This contemplates that the paper owner must have become dispossessed of the land by the adverse possessor.

What these provisions do not permit or contemplate is the situation where, as here, the adverse possessor brings a claim against the paper owner and then sets up the limitation

¹⁴ Chapter 54:07 of the 1990 Revised Laws of Dominica

¹⁵ Op cit

¹⁶ *Ibid* at paragraph 13

bar as against the paper owner as a basis upon which the adverse possessor becomes entitled to ownership of the land. “¹⁷

[40] The learned Chief Justice in the **Celestine Case** went on to extensively quote and take guidance from the learning gleaned from Cheshire’s Modern Law of Real Property which this court can do no better than to gratefully adopt and apply to this case:

“What the dispossessed person loses.

The dispossessed person ... loses[s] the title to possession that he could have previously enforced against the squatter. To that extent, his title is finally destroyed and there is no method by which it can be revived, not even by a written acknowledgement given by the squatter.

But the restricted effect of the extinguishment must be realized. It extinguishes nothing more than the title of the dispossessed against the squatter.

What the squatter acquires.

It follows from what has been said, that the sole, though substantial, privilege acquired by a squatter is immunity from interference by the person dispossessed. In other words, the statutory effect of twelve years’ adverse possession is merely negative not, as Baron PARKE once said, “to make a parliamentary conveyance to the person in possession.” This judicial heresy has long been exploded and it is now recognised that: “we must not confound the negative effect of the statute with the positive effect of a conveyance”

There is no transfer, statutory or otherwise, to the squatter of the very title held by the dispossessed person. “He is not at any stage of his possession a successor to the title of the man he has dispossessed. He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time the one or more periods allowed by statute for successful intervention. His title, therefore, is never derived through but arises always in spite of the dispossessed owner.”¹⁸

¹⁷ Ibid at paragraph 15

¹⁸ 12th Ed. at p. 901 quoted at paragraph 16 of the Celestine Judgment

[41] The claimant's indefeasible title cannot be challenged in a court of law on the ground that someone else is the true owner of the land. For such challenge to succeed it must be on the ground of fraud connected with the issue of the certificate of title or that the title has been superseded by a title acquired under the provision of the RPL Act, that is by adverse possession. **Re: Shillingford –v- The Attorney General of Dominica¹⁹, The Attorney General of Dominica –v- Shillingford²⁰, David George –v- Albert Guy²¹ and Graham Davis et anor –v- Charles et al²².**

[42] In the **David George** matter, the Court of Appeal under the hand of Baptiste JA adopted the legal opinion stated by the Privy Council after that court examined Sections 2 of the RPL Act and 34 of the TBR Act (Antigua). The Privy Council stated

"It is apparent from these provisions that a title registered under the Title by Registration Act could only be superseded by a prescriptive title acquired under the Real Property Limitation Act where the court had directed the Registrar to issue a certificate of title to the person claiming under section 34 of the former [Title by Registration] Act." (*Section 34 of the Antigua Act is in identical terms to Section 33 of the TBR Act of Dominica)*

[43] I too respectfully adopt the legal position enunciated by the Privy Council and applied by our Court of Appeal.

[44] In the case at bar, the Defendants are all seeking to supersede the claimant's title to her land by way of prescription. Section 33 of the Title by Registration Act provides the procedure by which a claim to a title acquired by prescription in respect of registered land is to be made.

[45] Therefore, in the case at bar, the defendants have not superseded the claimant's title under the RLP Act. There is no automatic extinguishment of a registered title. A person wishing to make a claim by way of prescriptive rights or adverse possession must make such a claim following the provisions and procedure laid out in section 33 of the TBRA. It is a matter of law.

¹⁹ Op Cit

²⁰ Op Cit

²¹ Op Cit

²² (1992) 43 WIR 188. (Antigua & Barbuda)

Possession:

[46] The word 'possession' in the Act is to be given its ordinary meaning. The applicable principles on what "constitutes 'possession' in the ordinary sense of the word" are those stated by the House of Lords in **JA Pye (Oxford) Ltd. v Graham**⁸ and restated by Slade J in **Powell v McFarlane**⁹ and the Court of Appeal in **Buckinghamshire County Council v Moran**¹⁰. See also: Foster J [Ag] in **Donovan-Carty and others –v- Donovan and ors.**¹¹ at para. 24 and George-Creque J in **Carty v Edwards**.¹²

[47] As Lord Browne-Wilkinson in **Pye** put it:

"There are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession".¹³

[48] Now, the questions which arise for determination are (1) did the Claimants have factual possession of the lands? and (2) did they have the intention to possess?

[49] In **Pye**, Lord Browne-Wilkinson, citing Slade J. in **Powell** continued (at page 436):

"Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. **Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time.** The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...Everything must depend on the particular circumstances, but broadly, I think **what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.**" [Emphasis added]

Discussion on the individual cases brought by the defendants.

[50] The claimant holds the certificate of title to her land and her title is indefeasible. The onus falls on the defendants to prove that she obtained her Certificate of Title by fraud or that they have dispossessed her and acquired title against her title adversely.

[51] I think none of defendants were totally truthful in their evidence. It is for them to lead a sufficiency of evidence to satisfy this Court, on a balance of probabilities that the claimant obtained her title by fraud or that they adversely possessed the various parcels of land in question.

[52] I will now look at the case of each defendant in turn

VALENTINE GRAHAM:

[53] Mrs Graham, the first defendant in her evidence stated that she has been in occupation of the portion of land she is laying claim to since 1978. She contends that when she entered onto the parcel of land it did not belong to her and that she did so intending to keep everyone out including the rightful owner and make the land her own. The claimant's claim is that Mrs Graham is a licensee.

[54] She said when she entered onto the land, she understood the owners of the land to be McDonald Baptist and his wife Stephanie Baptiste. Mrs Graham in her evidence stated that she has been in open and continuous possession of the land from 1978 to March 2009. She spoke to receiving a notice to quit in 2007 from the claimant but that she did not quit.

[55] Mrs Graham denies that she had the permission of Mr Bannis to occupy the land and she was adamant that she never occupied the land with permission and that she never paid any rent in cash or in crop for her occupation of the land.

[56] Mrs Graham in her evidence said that she placed a caveat against the claimant's title which caveat she removed in 2012. A review of the caveat by Mrs George dated and filed on the 18th June 2007, Mrs

George claimed to have a vested interest in the land because she was an occupant of the land which she asserted at that time was owned by the Crown. She claims she never read the caveat only signed it.

[57] Mrs Graham in her evidence claims she was never disturbed in her occupation of the land and that she only knew the claimant owned the land in 2009.

[58] Under cross examination Mrs Graham prevaricated on a number of things. She sought to say she only knew that the claimant owned the land in 2009 when proceedings were commenced, and then she knew when she received a notice in 2007. She said that she knew that the claimant took her brother to court for possession of land in the 1900's that she could not remember the year. Under the pressure of very probing cross examination by Mrs Dyer Munro she said that when the claimant took her brother to court she was not on the land. She also said that when the claimant took her brother to court she knew that the claimant was the owner of the land. She also said under cross examination that her mother was on the land before her, and then she said no blood family member was on the land. She also then said that when the claimant took her brother to court she was there but the claimant said nothing to her.

[59] When faced with the survey plan attached to the claimant's certificate of title which survey was conducted in 1981 and the note said that there were no occupiers of the land Mrs George said that the surveyor was lying.

[60] In her witness statement Mrs George stated that she had her parcel of land surveyed and valued in 2008 and that the land she occupied was 1.623 acres and was then valued at \$12,984.00

[61] Mr Bannis said that Mrs George entered the land and was cultivating prior to the claimant obtaining her Certificate of Title. He said that she entered onto the land with his permission.

[62] It is clear to this Court that Mrs George's evidence in totality is, at its highest, unreliable. This is so because she did not impress this Court that she was being forthright, even when simply faced with what was contained in her Caveat. Her answers in cross-examination confirmed to the Court the degree of unreliability. In fact, her said answers completely strip her evidence-in-chief of any

semblance of believability. I therefore reject her evidence. I do not accept that she entered the land when she said she did with the intention to dispossess the claimant.

[63] This witness adduced no evidence whatsoever of fraud on the part of the claimant. It is the finding of this court that this defendant has failed to discharge her burden of proving adverse possession to the parcel of land to which she is seeking to lay claim.

THEODORA CHARLES

[64] Mrs Theodora Charles, the second named defendant says that she has been in open and continuous possession of her land since 1964 to the present time and that for the period 1964 to 2009 she was undisturbed. She says she went onto the land without permission and has used her parcel to farm the land. She says she has never paid rent to the claimant or to anyone representing her. She says she made a dirt track around her portion of land to prevent anyone from encroaching on her parcel.

[65] Mrs Charles says in her evidence in chief that in 2008 she had the land surveyed and valued and found her parcel comprised of 1.652 acres of land with a value at the time of EC\$13,216.00

[66] Mrs Charles in her witness statement spoke to receiving a notice to quit from the claimant in 2007 but she refused to quit and deliver up the land.

[67] Mr Bannis in his evidence said that Ms Charles occupied the land with his permission and that it is wrong to say that she has occupied the land since 1964 in excess of 50 years.

[68] Mrs Charles told this court that she and her husband were the registered owners of another piece of land that they plant. She also said that she lives between Dominica and St Thomas but when she is in St Thomas her children who live here look after the land for her. That she does not leave the land.

[69] Under cross examination this witness told the court that she could not read and write and sought to deny statements made in her witness statement and in an affidavit of long possession that she swore in

support of her application to get title to the land. This witness sought to disassociate herself under cross examination from Miss Mingo who referred to her as her cousin.

[70] This witness was not very persuasive to this court. I agree with learned Counsel Mrs Dyer Munro when she submits that this witness was telling this court what she was told by others to say and not what she knew of herself and what she knew personally. She sought in her evidence to also support the evidence of her fellow defendants by saying that they cultivated the parcels of land around hers; however under cross examination she did not know any of the persons whose names were put to her by counsel to be planting the land. Under cross examination this witness also said that she did not put a dirt foot path around the extremities of her lands. In her witness statement she said she made a dirt track around her land to separate her portion of land from the others and to prevent others from encroaching.

[71] When this witness was giving her evidence, it was noted that she appeared to not be following the questions and statements put to her by counsel Mrs Dyer Munro on behalf of the claimant. In fact she became defensive when the claimant's case was being put to her. She even introduced evidence of her children keeping the land which if true this court is of the view she should have included in both her witness statement sworn in this case and her affidavit of long possession which she swore to in an effort to obtain title to her parcel.

[72] The court was not persuaded by this witness that she was in fact on the land since the 1960's as she sought to state. The court finds that there was no evidence that Mrs Charles had factual possession of the subject land to the exclusion of the claimant. There was also no evidence that this defendant had requisite the animus possidendi to dispossess the claimant of her ownership of the land. Further this witness adduced no evidence whatsoever of fraud on the part of the claimant. Consequently, the court finds that Mrs Charles occupation of the subject land was not adverse to the claimant's ownership of same.

KIMANY MITCHELL

[73] Kimany Mitchell is the third defendant and in his witness, statement said that he occupied the land to which he lays claim in 2000. His case is essentially that he continued the possession of the parcel of

land first started by his uncle Alphonso Graham who was on the land from 1988 to 2000. He stated that this parcel was also occupied and farmed by his grandmother Bernadine even before Alphonso.

[74] Kimany said that he did not obtain permission from anyone to enter or occupy the parcel of land he lays claim to neither did he pay rent in cash or crop to anyone. He said he used the land for agricultural purposes.

[75] In his witness statement Kimany said that he has been occupying the land and it is not until 2009 with the commencement of these proceedings that his occupation was interfered with, he said that there was no complaint about him occupying the land or about his uncle or grandmother occupying before him.

[76] Kimany said that in 2008 the land that he occupies was surveyed and it was found that he occupied 1.107 acres which was valued at \$16,605.00 at the time of the survey and valuation.

[77] Mr Bannis in his evidence says he did not know of Kimany working the land from 2000. He said that when he first took charge of the land Kimani was a schoolboy.

[78] Under cross examination Kimany admitted that his uncle vacated the land in 1988 and not in 2000. Kimany under cross examination also denied at one stage that his land was not near his mother's land however when faced with the survey plan, he agreed that his land was bounded to the land of Jeanette George who is his mother.

[79] Kimany disagreed with Counsel Mrs Dyer Munro that he along with other family members (the fourth and fifth defendants) were together trying to take the claimant's land. It is noted that under cross examination Kimany contradicted what he averred in his affidavit of long possession which was before the court. In that affidavit he said his uncle stopped planting on the parcel of land he occupies in 2000 and he went onto the land and used same. He admitted that his uncle in another affidavit which is also before the court said that he came of the land in 1988 and therefore his Uncle was not on the land in 2000 as he was attempting to establish.

[80] This court accepts that Kimany's uncle left the land in 1988 and not in 2000 as he sought to claim. There therefore was a break in the alleged "continuous" possession of this parcel of land.

[81] The court finds that from Kimany's evidence it was a clear indication that he could not have had exclusive possession of the subject land for the length of time he claimed. The evidence that he continued the alleged possession of his grandmother and uncle has been clearly discredited. The court finds that it is highly improbable that this defendant could have occupied the land to the extent he claims that is if he occupied the land at all.

[82] Conclusively, the court finds that based on all of his evidence Kimani has failed to make out his claim that he has been in adverse possession of the subject land from 1988 and before through his grandmother and uncle or from 2000 as he has claimed.

MATTHEW GRAHAM

[83] Mathew Graham the fourth defendant does not claim to own the land in his own right. In his witness statement he says that the land that he has been working on belongs to his sister Jeanette Graham and he assists her. He said that his sister has been in possession of the land since 1985 to the exclusion of all others including the rightful owner. He said he planted cedar trees all around her land to keep others out including the rightful owner.

[84] Mr Bannis in his evidence said that it was not Matthew Graham who took up possession of the parcel of land that it was his sister and that he Matthew worked the land for his sister. Mr Bannis said he gave Jeanette Graham permission to go onto the land and that she in fact paid a single month's rent.

[85] Under Cross Examination Matthew told this court that he knew he was not entitled to the land and that he never applied for ownership, he also accepted that the land subject of this case bordered with land owned by his father. He denied having obtained Mr Bannis' permission to go onto the land. It is noted that in commenting on the evidence of the claimant and on the evidence of Mr Bannis this witness sought to say that he had a right to the claimant's land and that he entered the land without permission

and was not paying rent. In his witness statement and under cross examination he said that he was not entitled to the land that it is his sister who is entitled to the land.

[86] Mr Graham has clearly not supplied this court with any cogent evidence to establish a personal interest in the land adverse to that of the claimants neither has he adduced any evidence to suggest that there was fraud on the part of the claimant in her obtaining her Certificate of Title as pleaded on his behalf in the statement of defence. This witness is not in possession of the parcel of land it is clear that he assisted his sister on the plot that she occupied but his evidence does not assist his sister's case in any way either.

JANET GRAHAM

[87] Miss Janet Graham "Janet" claims to have entered the portion of land she is claiming in 1985. She says in her witness statement that before she occupied the land her father Murray Graham occupied and cultivated the same spot. She said when she first entered the land it was with the intention of taking control of the land with the intention that it would be hers.

[88] Janet said her father planted cedar trees around the parcel of land to separate it from adjacent portions and to make it clear to everybody that the spot was his. She said she planted more trees and made a dirt track on the western boundary to let everyone know that the land inside was hers.

[89] Janet said she did not ask Mr Bannis or anyone to go on the land that she went onto the land on her own account. She said she never paid rent to Mr Bannis or anyone in cash or in crop. She maintains that she went onto the property in 1985 and has been in open continuous occupation and possession of the said parcel since then without interference up until 2007 when the claimant brought this case against her.

[90] Janet says that sometime in 2008 she got a survey of the parcel of land she was occupying in the amount of 2.684 acres with a value at the time of \$21,472.00

[91] Janet said in her witness statement that she did not know of any meeting in 2007 with a surveyor to discuss ownership of the Tranto estate with squatters. She did however receive a notice to quit dated 24th October 2007 from the claimant. She did not move out of the land as demanded.

[92] Janet's evidence contained inconsistencies such as in her witness statement she said she did not know of a meeting that was supposed to have been called with the surveyor in 2007 which discussed the ownership of land at Tranto. Under cross examination initially she did not know Mr Watt the surveyor spoke to the people in 2007, she said he never spoke to her in 2007. Then when pressed by Counsel Mrs Dyer Munro changed her story and she said

"... I knew when he came in 2007, I know that he came to survey for Celina. He said that in the congregation, and I was in the congregation. When he said that in the congregation is that time, I know that Celina had title. When he spoke about Celina Having title since he spoke of that it means he owned the land. The land he spoke about was Celina's Land at Tranto. In the congregation Valentine was there, Fedora was not there, there were other people there. I cannot remember if my brother Matthew was there. St Hilaire was not there. When I say congregation, I mean like a meeting with a lot of people."

[93] This witness did not impress this court as being a truthful witness as it regards her evidence of her occupation. She has in my considered view failed to establish on a balance of probabilities that she occupied the land with the intention to own. I accept Mr Bannis' evidence that she entered onto the property with his permission and she in fact continued the work started by her father.

ST HILAIRE NATION

[94] This defendant died by the time the matter came to trial and he was substituted by his daughter Marcella Mitchell. Now Marcella is married and lives in Tarish Pit which is closer to Roseau, which is some distance away from Castle Bruce. Mrs Mitchell moved away from Castle Bruce since 1981. It is her father's case that he occupied two pieces of land in Tranto amounting to 2.426 acres valued at \$19,408.

[95] There is some uncertainty as to whether or not Mr Nation occupied one or two pieces of land and under cross examination the daughter Mrs Mitchell could not say clearly whether or not it was one or two. Eventually she sought to tell this court that after he father's death she and her children continue to work one piece of land and that she is waiting on the outcome of this case to decide on the other piece.

[96] Mr Bannis in his evidence said Mr Nation occupied one portion of land with his permission in fact that Mr Nation paid rent for some time until he got sick.

[97] Mrs Mitchell denied that her father was given permission to occupy. She also did not know that her father received a notice to quit from the claimant. She admitted after being pressed by Counsel for the claimant under cross examination that there came a time when her father stopped farming the land. Does this amount to a brief abandonment by Mr Nation? This witness was also unable to address the question as to whether or not her father signed a document agreeing to vacate the property

IRVIN SERAPHINE

[98] Evidence was given by this defendant and his wife in support of their defence and claim. They say they went onto the parcel of land they occupy in 1989 after Mrs Seraphine's stepfather ceased to work the land. It is their evidence that they went onto the land and occupied said land without permission from anyone including the claimant or Mr Bannis. They also deny making any kind of payment for their use and occupation of the plot of land. Their plot was surveyed in 2008 and found it to contain 5.182 acres and was valued at the time at \$41,456. The Seraphines' claim to use the land for agricultural purposes.

[99] Mrs Seraphine said that her sister planted half of the land vacated by her father. Mr Seraphine says that is not so that his sister in law did not plant on the land after her stepfather stopped planting on the land. Mr Seraphine also spoke to never seeing Annette come onto the land while he was there. Mr Seraphine could not remember any date as to when he was served with documents or when he surveyed the land or when he went to the lawyer. The only date he remembered was 1989 when he

allegedly went onto the land. This court finds this to be very strange and taints Mr Seraphin's evidence. He did not come over to this court as being a truthful witness.

WILLIAM CHARLES

[100] Mr Charles says he went onto his parcel of land as a trespasser in or about 1980 without any permission and that he never paid rent of any kind to anyone. He said his father occupied the same spot in the early 1950s. This witness says he used the land for agricultural purposes and that he separated his portion from adjacent plots and guarded against any encroachments by others.

[101] Mr Charles in his witness statement spoke to receiving a notice to quit from the claimant and stated that he knew nothing about any meeting called by a surveyor to discuss the occupation of the Tranto lands by squatters.

[102] The defendant had his portion of land surveyed in 2008 and his portion of land contained 3.535 acres of land and was valued at that time at \$28,280.00.

[103] Learned Counsel Mrs Dyer Munro in her closing submissions stated this witness denied receiving a letter in 2007 and only admitted receiving a letter when confronted with his signature under cross examination. I think that Counsel is mistaken as it regards this witness. At paragraph 12 of his witness statement this witness stated that he got a letter from a lawyer asking him to stop occupying or trespassing on the land. What this witness was saying was that he received a letter from the claimant and not from Mr Bannis. A review of his cross examination this witness was saying he did not get a letter from Mr Bannis in 2007 and quite rightly so.

[104] This witness in his witness statement that shortly after he first went on the land he stopped planting crops because money to do so was scarce. Under cross examination he said that after he got the letter he did not stop going to the land. This court understands this witness to be saying there was a time he stopped going to the land for a period of two months but that was when he first started going to the land in 1980 and not after he got the letter. He says quite to the contrary both in his witness statement and under cross examination.

[105] This witness told this court under cross examination that he was a builder, that he was building since the 1980s and he would build for two three days and that is how he made his money. Learned Counsel for the claimant in her closing submissions sought to state that this witness abandoned the land and went to build a review of the court's notes of evidence does not support counsel's submissions in this regard.

CONCLUSION

The Claimant's Case

[106] The claimant submits is that judgment should be entered in her favour because::

- i. the defendants have failed to properly plead the defence of adverse possession in that the Defendants have failed to properly plead the Real Property Limitation Act Ch 54.07 of the 1990 Revised Laws of Dominica and therefore have failed to proffer a defence incorporating adverse possession;
- ii. the defendants' Counterclaim ought not to be entertained on the ground that the defendants have sought to use the principle of adverse possession as a sword when it can only be utilised as a shield as established in the case of **George v Rosalie Estates**²³. In this case it was established that the defendants cannot bring a claim against a registered proprietor and their counterclaim therefore fails; (it is noted that their counterclaim was struck out on other grounds in the beginning of the judgment)
- iii. the defendants' have failed to discharge their evidential burden of proving their case on the balance of probabilities. The claimant's contention is that they have not discharged the evidential burden of their long possession as their evidence was proven to be untruthful and unacceptable. Learned Counsel submits that every defendant was found under cross-examination to contradict their evidence on the material issue surrounding their respective occupation;
- iv. the claimant has established that she is the registered proprietor of a Certificate of Title for the land subject matter of the case, that it is established law that her title is therefore indefeasible and the defendants having failed to plead the limitation of statutes cannot

²³(1969) 13 WIR 401

challenge the Claimant's Certificate of Title; (the Court will deal with this submissions shortly) and

- v. In the closing salvo of her submissions learned counsel Mrs Gina Dyer Munro submitted that "The Case of **Albert Guye vs David George** which is currently on appeal to the Caribbean Court of Justice (CCJ) should not affect the Court's ruling in the case at bar. This arises as the Defendants' pleadings herein do not raise the limitation defence. In **AlbertGuye v David George** , the defendant raised that defence. "²⁴ (The court will address this issue shortly)

The Defendants' Case

[107] As was stated earlier in the judgment, the defendants attempt at discontinuing the counterclaim in their written submissions is wholly irregular and cannot be allowed and based on the reasons stated aforesaid the said counterclaim has been struck and costs to be assessed is awarded to the claimants in that regard.

[108] The defendants contend that they have all been in exclusive physical occupation and control of the various parcels of land for a continuous period of 12 years or more and that they have met the three requirements for obtaining adverse possession²⁵. The defendants also contend that possession continued by more than one person²⁶ as in the case of Kimani Mitchell who sought to continue his uncle's possession.

[109] That they have had the years of possession, that they have been in undisturbed physical occupation and control and that they had the requisite *Animus Possedendi*. That all the defendants occupied their respective parcels with the intention of making it their own.²⁷

²⁴ Paragraph 91 of the Claimant written closing submissions

²⁵Re: **Pollard v. Dick**, Court of Appeal St. Vincent Civil Appeal No. 11 of 1976.

²⁶J.D. Riddall, **Introduction to Land Law**, 4th Edition (Butterworths, 1988, pages 411-417).

²⁷Re: **Buckinghamshire County Council v. Moran** (1989) 2 ALL ER 225, CA.

[110] The defendants contend that the claimant is barred from bringing the action or suit in the case at bar against them whether for trespass, or for a declaration that the adverse occupier was not entitled to remain on the land, or for recovery of the same based on the provision of Section 2 of the **Real Property Limitation Act**²⁸ which states

“ After the commencement of this Act, no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress or, or to bring the action or suit, has first accrued to some person through whom he claims; or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same.”

[111] Learned Counsel Mr William Riviere on behalf of the defendants contended that after 12 years of adverse possession by a person, the holder of the Certificate of Title is barred from bringing an action or suit against that person whether for trespass, or for a declaration that the adverse occupier was not entitled to remain on the land, or for recovery of the same.

[112] Counsel Riviere submitted that Section 33 of the **Title by Registration Act** has in some cases been interpreted to define circumstances under which the prohibition does not apply. Counsel further posited that it has been widely interpreted to mean that the person who is deemed by the **Real Property Limitation Act** to be in adverse possession is required to make a request to the Registrar for the issue of a Certificate of Title to him in lieu of the registered owner. The Registrar then states a case to the Court. The court makes a determination, and if favourable, the Registrar issues a Certificate of Title to the squatter. Notably, the section states that the squatter “shall not be entitled to maintain any suit in regard to the land until he has obtained a Certificate of Title thereto.”

²⁸Chap. 54:07.

- [113] Mr Riviere further submitted that this construction of Section 33 of the TBRA implies that unless this procedure is followed and a replacement title is issued to the person in adverse possession, that person has not acquired title under Section 2 of the Real Property Limitation Act and can, therefore, be challenged in a Court of law by the physically dispossessed title-owner.
- [114] Counsel made reference to the court's ruling in **Burton Riviere v. Judith Durand**²⁹, delivered in 2010, where on the facts, adverse possession was admitted and the Court of Appeal upheld the decision of the lower Court to prohibit the paper title owner from filing suit against the squatter. Reference was also made to the most recent Dominica case, **David George and Albert Guye**,³⁰ where the Court of Appeal held that the claimant holding a Certificate of Title was entitled to maintain suit against a defendant who had by the Real Property Limitation Act obtained adverse possession, but had not been issued a replacement Certificate of Title due to failure on his part to follow the procedure set out in Section 33 of the Title by Registration Act. Learned counsel disagreed with the decision of the Court of Appeal
- [115] After briefly reviewing the history of the legislation Counsel Riviere submitted, then, that the construction placed on Section 33 of the Title By Registration Act is flawed, and that Section 2 of the Real Property Limitation Act stands on its face.
- [116] The defendants submitted that the claimant had not proved here case on the balance of probabilities.

The Court's Conclusions and finding

- [117] Based on the evidence presented, there is no doubt that the claimant is the registered owner of the parcels of land in question and according to law her title is indefeasible, and her possession of the land is presumed.

²⁹DOM HCV AP2006/0013

³⁰DOM DCV AP 2012/0013,

[118] The defendants all claim to have adversely possessed their various parcels of land extinguishing the claimant's title. They also claim that the claimant obtained her title by fraud. The defendants' defences as pleaded are the defences available to them in the RLA. The defendants pleaded fraud but provided no particulars of fraud to support their claim.

Fraud

[119] The law in relation to fraud is clear. In order to set aside a document allegedly obtained by fraud, it is not sufficient simply to assert fraud without giving the particulars; the fraud must relate to matters which prima facie would be a reason for setting the document aside if they were established by proof, and not to matters which are merely collateral³¹.

[120] The case of **Derry –v- Peek**³² establishes that fraud is proved when it is shown that a false misrepresentation has been made knowingly, or without belief in its truth, or recklessly, careless in this regard whether it be true or false.

[121] The defendants have however not provided this court with any evidence of fraud to a standard that is required by the law. This Court is unable to properly conclude that the claimant has committed any fraud in having parcel of land at Tranto registered in her name. No documentary evidence has been produced on which the defendants wish the Court to take note of and rely on in order to substantiate the allegation. The evidence they wish to rely on is a statement that the claimant obtained her title fraudulently stating that the claimant knew or ought to have known that they were on the land and proceeded to tender evidence to the contrary in support of her application for title³³. This is very meager.

³¹See Halsbury's Laws of England 4th Ed. Vol. 26 para. 560.

³²[1889] 61 The Law Times Reports (Sept. – Feb. 1889-90) 265 at 276

³³ Paragraph 3 of the Defendants' statement of defence

[122] There being no credible evidence to establish or even buttress their contention of fraud, accordingly, the Court is of the view that the defendants are unable to succeed in challenging the claimant's title to her land on this ground.

Adverse possession

[123] The law is clear that the burden of proof is on each of the defendants to prove their case on a balance of probabilities. The defendants will each have to prove that they have not only dispossessed the claimant more than 12 years from when the action accrued which is the time of trespass or when the persons entered the land without permission but that they have acquired title. Have they done so?

[124] It is the actions and intentions of the parties during this period that will determine the proper outcome of the case. It is noted that all the disputed land in the case at bar consists of agricultural land and all the defendants claim to have occupied same as farmers without the permission of anyone. They all deny paying rent whether in cash or in crop to anyone including the claimant and or her agents and or representatives. Were the defendants in possession of the land with the claimant's permission?

[125] In assessing which of the defendants in the case at bar have been in undisturbed possession of the plots as they claim, examining the version of facts as presented by the defendants in the evidence against their pleaded case considering whether their cases are probable or improbable against of the different contentions made in those pleaded cases.

[126] It is to be noted that the defendants in their single statement of defence and counterclaim filed appears to want to shift the burden of proof to the claimant.

[127] At paragraph 2 of their Defence and Counterclaim filed on the 30th July 2010 the defendants "put the claimant to strict proof that she was the owner in possession of the portion of land subject matter of the claim". They also go on to say that "Instead the defendants say that they have all been in continuous possession and undisturbed possession of the same".

[128] This court accepts that the claimant is the registered owner of the land as is evidenced by the duly issued Certificate of Title presented. The case of **Powell**³⁴ is instructive on what constitutes possession. Slade J said

“In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*“animus possidendi”*).”³⁵

[129] The cases of **Powell**³⁶ and **West Bank Estates Ltd –v- Arthur**³⁷ establish that what must be shown by the person seeking to establish adverse possession is that that person must have been dealing with the land in question as an occupying owner might have been expected to deal with the land and that no one else has done so.

[130] Even if this court finds that the defendants were on the property for more than 12 years applying the law as interpreted and applied by the Court of Appeal their possession even if it is adverse is not conclusive of the claim. The claimant’s title to the land being claimed by the defendants is ‘indefeasible. Her title would have been superseded or displaced only if the defendants had acquired title pursuant to section 33 of the Title By Registration Act.

[131] The Court of appeal in **David George –V- Albert Guye**³⁸ was called on to decide whether the respondent the holder of the Certificate of title to disputed land rights was superseded by appellant’s title acquired under Real Property Limitation Act. Justice of Appeal Baptiste in his judgment reviewed

³⁴*Powell v McFarlane* (1977) 38 P&CR 452

³⁵ *Ibid* at page 670

³⁶ *Supra*

³⁷ 1967 AC 665, [1966] 3 WLR 750

³⁸ DOMHCVAP2012/0013

the law in this regard in great detail and agreed and applied the Privy Council decision in the Antigua Case of Graham-Davis and Another v Charles and Others³⁹

[132] The Court of appeal held that Section 33 of the Title by Registration Act provides the procedure title is to be acquired by prescription in respect of registered land. The appellant in that case did not invoke section 33 and therefore the respondent's title was not superseded by the title acquired by the appellant under the Real Property Limitation Act. It was further held that in the absence of the court directing the Registrar to issue a certificate of title to the appellant pursuant to section 33, there could be no superseding of the respondent's title.

[133] It was held that respondent who held a Certificate or title for the disputed property was protected by his indefeasibility of title and no issue therefore arose as to his right to recover the land being barred or his title being extinguished. In the circumstances, his right to recover the disputed strip from the appellant was not barred nor was his title to the land extinguished.

[134] In the case at bar none of the defendants had prior to the commencement of these proceedings had obtained a certificate of title pursuant to section 33 of the Title by Registration Act and therefore cannot succeed in their claim.

Disposition:

[135] At the end of the day it is the claimant who is the registered owner of the land and her title is indefeasible. Each and every one of the defendants bore the burden of adducing evidence which if accepted would have proved fraud on the part of the claimant on the balance of probabilities. The defendants have also failed to adduce any evidence which can be accepted by this court that they acquired title under the RLPA which would have operated or operates to supersede the claimant's registered title. Judgment is therefore entered for the claimant.

[136] I have earlier dismissed the counterclaim with costs to the claimant

[137] Should the claimant wish to pursue her claim for damages direction will be given as to the further continuation of the claim that regard.

³⁹(1992) 43 WIR 188

[138] This court wishes to thank Counsel for their helpful submissions and their understanding patience in the time that it has taken for the court to deliver this judgment. Counsel is aware of the constraints under which this court currently operates.

M E Birnie Stephenson
High Court Judge

SEAL

BY THE COURT

REGISTRAR