

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF
THE EASTERN CARIBBEAN SUPREME COURT (Dominica)**

**CCJ Civil Appeal No. DMCV2018/002
Dominica Court of Appeal No. 13 of 2012**

BETWEEN

DAVID GEORGE

APPELLANT

AND

ALBERT GUYE

RESPONDENT

Before the Honourables

**Mr Justice A Saunders, PCCJ
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice A Burgess, JCCJ**

Appearances

Mr Justin Simon, QC and Mrs Gina Dyer Munro for the Appellant

Mr Michael E Bruney and Ms Lisa de Freitas for the Respondent

**JUDGMENT
of**

**The Honourable Justice Saunders, President
and the Honourable Justices Wit and Rajnauth-Lee, Judges**

Delivered by The Honourable Mr. Justice Saunders, President

and

**CONCURRING JUDGMENT
of the Honourable Mme Justice Rajnauth-Lee**

and

**DISSENTING JUDGMENT
of the Honourable Mr Justice Anderson**

and

**DISSENTING JUDGMENT
of the Honourable Mr Justice Burgess**

Delivered on the 28th day of November 2019

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

- [1] The facts that underlie this case are no longer contested. Resolving the dispute really now requires us to interpret two bits of legislation and to decide how they relate to each other. The facts can briefly be stated in the following way. Mr Albert Guye is the registered proprietor of a portion of land known as Lot S. 748 in the Pottersville Housing Scheme. Mr Guye purchased this land in 1995. A year later, a certificate of title was issued to Mr Guye in keeping with the provisions of the Title by Registration Act (the TRA).¹
- [2] For many years Mr George and his father had been in occupation of a strip of land that is part of the parcel to which Mr Guye's certificate of title relates. Everyone accepts that Mr George and his father occupied that strip for well over twelve years. Mr Guye was always aware of it, but he now wishes to recover possession of the strip. In 2007 Mr Guye filed this action claiming a right to regain possession.
- [3] Mr George's defence to Mr Guye's claim is that, under the provisions of the Real Property Limitation Act (the RPLA),² the title of Mr Guye and his predecessors to that strip has been extinguished. Mr George's position is that even if he, Mr

¹ Chapter 56:50 of the laws of Dominica

² Chapter 54:07 of the laws of Dominica

George, cannot maintain an action against Mr Guye to assert ownership of the strip of land, he is entitled to resist Mr Guye's claim to recovery of possession given his (Mr George's) long and continuous possession of the land.

- [4] Mr Guye's claim to recover possession is based on his certificate of title to the land. He states that, under the TRA, this certificate specifically renders his title to the land *indefeasible*. He argues that an adverse possessor cannot defeat the ownership rights of a registered certificate holder unless the adverse possessor takes certain procedural steps (which we shall shortly describe) under section 33 of the TRA. It is common knowledge that Mr George has not taken those steps. At least, not up to this time.
- [5] Both the trial judge and the Court of Appeal accepted Mr Guye's argument. But a majority of us have a different view. In our opinion Mr George's defence is well made and his appeal succeeds. In support of this determination, I propose to a) briefly summarise the relevant parts of the two pieces of legislation; b) survey the existing caselaw from Dominica; and c) discuss how the legislation and the caselaw support a viewpoint that differs from the decisions of the courts below.

The Real Property Limitation Act

- [6] As its name suggests, the RPLA is a limitation statute. Limitation statutes bar persons from bringing court actions that might otherwise be valid and reasonable. Ordinarily, they do so only on the basis of the inordinate length of time a claimant took before the claimant could have instituted the action. The RPLA combines the passage of time with the conduct respectively of a landowner and of a person who "squats" on the owner's land. The RPLA speaks to the doctrine of what lawyers refer to as *adverse possession*. Most persons might know this as "squatter's rights". These rights are succinctly captured by section 2 of the RPLA. The section states, among other things, that "no person shall ... bring an action ... to recover any land or rent but within twelve years next after the time at which the right to ... bring the action ... has first accrued to some person through whom

he claims”.³ In other words, if you allow someone to squat on your land for a continuous period in excess of 12 years, you are barred from bringing an action in court to recover the land from the squatter.⁴ By incorporating the 1833 Limitation Act of the United Kingdom, the RPLA goes even further. After the squatter has enjoyed your land continuously for the statutory 12 year period, your right *and title* to the land are extinguished and the squatter obtains a title that supersedes that of the registered proprietor. This dramatic result is to be seen not so much as rewarding a land thief but more as evidencing the abdication by a landowner of the ownership rights the law once vested in the landowner.

[7] The RPLA therefore imposes on all owners of land a responsibility continuously to exercise their ownership rights. Who has not heard the expression “possession is nine-tenths of the law”? Owners of land should obtain and maintain, whether by themselves or by others on their behalf, possession of the land they own. If they discontinue possession without making suitable arrangements for others to continue possession on their behalf, they are at risk of having their title to the land extinguished by any squatter who enters the land and remains in continuous possession for the statutorily prescribed period.⁵ This in turn means that, certainly in Dominica as in many other States, a person desirous of purchasing land, for example, should always be astute to ensure that the person in actual possession of the land is not a squatter who has been there for more than 12 years.⁶

[8] The RPLA provides no formal procedure to mark the extinguishment of the original owner’s title after the squatter has been in possession for the 12 year statutory period. A person’s title to land, according to the RPLA, could be extinguished behind her or his back; with no notification or formality whatsoever. One day, you are the proud owner of land evidenced by a title deed or duly registered certificate with your name on it and then, after a squatter has enjoyed the property for a period in excess of 12 years, your cherished certificate

³ Real Property Limitation Act, Section 2

⁴ Real Property Limitation Act, Sections 2-3

⁵ Real Property Limitation Act, Sections 2-3

⁶ See *James Clinton Chisolm v James Hall* (1959) 1 WIR 413 at 421(I)

ostensibly evidencing your ownership of the land occupied by the squatter practically means nothing.

The Title by Registration Act

[9] The TRA was enacted in Dominica about ten years after the passage of the RPLA. In enacting the TRA the legislature took fully into account the provisions of the RPLA. But nothing in the TRA states that it was an Act to amend the RPLA in any way. The purpose of the TRA was to enact the system of land ownership that had been adopted by some countries. It is a system that is named after Sir Robert Richard Torrens who designed and first introduced it into South Australia. The Torrens system encourages, if not mandates, landowners to bring their land under a registered system of land ownership and so to obtain a registered title certificate for the land you own.

[10] Before the Torrens system was introduced in the latter half of the 19th century, a purchaser or mortgagee of land, for example, could not depend on a title deed as evidencing the true ownership of the person whose name was on the title deed. Lawyers and/or their clerks would have to engage in much arduous research and inquiry to ensure that the title was a good and marketable one. The legislative scheme behind the Torrens system has been aptly described in *Gibbs v Messer* as being to

...save persons dealing with registered proprietors the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.⁷

Dominica's TRA provides, for example, that a certificate of title and the notings on the certificate "cannot be challenged in any court of law on the ground that

⁷ See *Gibbs v Messer* [1891] AC 248 at page 254

some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth”.⁸

- [11] The indefeasibility of a Certificate of Title in Dominica is not absolute. The TRA expressly admits of two exceptions to such indefeasibility. The first is “fraud connected with the issue of the certificate of title”. So, for example, if you deceived the Registrar of Titles into issuing you with a certificate for a parcel of land that is in fact rightfully owned by someone else, then your certificate is not “indefeasible”. The true owner would naturally be entitled to defeat its validity by establishing the fraud. The second exception is the one that is relevant to this case.
- [12] A certificate of title is not indefeasible where “the title of the registered proprietor has been superseded by a title acquired *under the RPLA*”. We emphasise the phrase “under the RPLA” because these words are telling. The TRA could have stated in their stead *under the TRA*, but it did not. It plainly suggests that it is to the provisions of the RPLA that one must turn to determine whether and when “the title of the registered proprietor has been superseded by a title acquired” by a squatter.
- [13] Providing an exception, a carve out, for adverse possession is a feature that is common to many of the statutes in the countries that embrace the Torrens system of registered land. As Lloyd Barnett notes,⁹

In preserving the limitation provisions in respect of registered land, [the law] expresses the ancient maxims that “it is more important that an established and peaceable possession should be protected than that the law should assist the agitation of old claims”. A statute which affects this purpose is “an act of peace”. “Long dormant claims have often more of cruelty than of justice in them”. *Cholmondeley v Lord Clinton* (1820) 2 Jac. & W. et 140; *A’Court v Cross* (1825) 3 Bing. 329 at 332.

⁸ See First Schedule of the TRA where “Indefeasible” is defined

⁹ Dr Lloyd Barnett, “*The Jamaican Land Registration System and Possessory Titles*”, (1998) WILJ 72, para 6

- [14] In making this exception for adverse possession, the TRA accepts, recognises and endorses the notion that the ownership rights of a person with a supposedly indefeasible certificate of title may be extinguished, that is to say, supplanted or “superseded”, by a title acquired under the RPLA. Where a registered proprietor has discontinued possession of a parcel of land for a period in excess of 12 years and a squatter has been in possession for that time or more, the title of the registered proprietor suffers precisely this fate. The RPLA disables the registered title owner from further asserting ownership over that land occupied by the squatter. Far from qualifying or limiting this drastic consequence of the RPLA, the TRA carries it a huge step further. Section 33 of the TRA recognises the ownership rights of the squatter and provides a mechanism, a procedure, for strengthening and formalising those rights so that they can be made consistent with the Land Register. Section 33 states:

Where any person has acquired or claims to have acquired under the Real Property Limitation Act, the ownership of land brought upon the operation of this Act, he shall present a request to the Registrar of titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title, and the person who has acquired, or claims to have acquired, the ownership shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title thereto. When a request for such a certificate of title is presented to the Registrar of Titles, he shall state a case to the Court, and shall not issue a certificate of title on the request until he has received the direction of the Court thereupon.

- [15] The Court of Appeal, relying on certain remarks by the Privy Council in the Antigua and Barbuda case of *Graham-Davis and Another v Charles and Others*,¹⁰ interpreted the TRA to mean that a) section 2 of the RPLA (See [6] above) has implicitly been replaced or modified by section 33 of the TRA, or that b) the consequences of section 2 are somehow inapplicable to registered land. The Court of Appeal held that, unless a squatter embarks upon and completes the section 33 procedure, adverse possession by the squatter against a registered proprietor for a period in excess of 12 years counts for nought; that a registered title, being “indefeasible”, cannot be defeated merely by long adverse possession by a

¹⁰ (1992) 43 WIR 188

squatter; and that the second exception to indefeasibility referred to at [12] above is premised upon the squatter in adverse possession first engaging section 33 of the TRA. We in the majority disagree with each of these conclusions. The caselaw coming out of Dominica prior to the Court of Appeal's decision in this case is also inconsistent with them.

The caselaw from Dominica

[16] Several cases from Dominica address the relationship between the RPLA and the TRA. The case of *George v Rosalie Estates*¹¹ is concerned with a narrow preliminary point. The appellant there claimed to have been in adverse possession of 5.85 acres for well over the statutory period. The respondent had a certificate of title for the Rosalie Estate that included the 5.85 acres. Without first successfully engaging the section 33 procedure, the appellant instituted action against the respondent for trespass. The Court of Appeal rightly upheld the trial judge's preliminary submission that the appellant's cause of action had not accrued at the date he filed his action. In other words, he could not use whatever rights he may have acquired under the RPLA to institute an action, without first obtaining a certificate of title under section 33. This decision is fully consistent with what section 33 states. To maintain or commence a suit in regard to land, the squatter must first have a certificate of title.

[17] In *Green v Joseph*,¹² the question was whether a squatter had, by adverse possession, defeated the ownership rights of a registered proprietor who was suing for recovery of possession. Justice Joseph did not for a moment consider that the supposedly indefeasible certificate of title of the registered proprietor immunised the registered owner from the risk that the squatter could dispossess her and extinguish her registered certificate. The squatter's defence failed because the squatter could not establish adverse possession for the requisite

¹¹ (1965) 13 WIR 401

¹² Dominica High Court Suit 277 of 1987, Judgment delivered July 30, 1990; DM 1990 HC 7 (JustisOne)

period. The squatter was unsuccessful because of his inability to provide the necessary evidence. But in the course of her judgment Justice Joseph stated:

...I do not consider that the defendant was in exclusive possession of the land. Possession by the plaintiff and her predecessors in title of a portion of the estate constitutes possession of the whole and it would be for the defendant to satisfy the court that he has dispossessed the plaintiff of the portion that he cultivated for the 12 year limitation period and that the plaintiff's title, had been superseded by sec. 2 of the Real Property Limitation period. He has not done so.

- [18] In the case of *Phillips v James*¹³ the squatter was able to marshal the required evidence. In that case the plaintiff, a registered proprietor, sought to recover possession from a squatter. Cenac J stated:

I ... accept the defendant's evidence that he was in possession, undisturbed possession, of the parcel of land since about 1977, a period in excess of the prescribed period of twelve years so that the plaintiff's title to that portion of the land is superseded by the provisions of section 2 of the Real Property Limitation Act, Cap. 54:07 and that the defendant has acquired a title thereto by adverse possession...*Mr David's argument that the plaintiff's title is indefeasible by virtue of section 8 of the Title by Registration Act, Cap. 56:07 is not tenable having regard to the meaning assigned to the word "indefeasible" as contained in the First Schedule thereto* (emphasis added).

- [19] In *Castaways Development Ltd v. Castaways Hotel Ltd. et al.*,¹⁴ the same judge, Cenac J, had to address the preliminary issue of whether the claimant's Statement of Claim should be struck out. In the course of his judgment, the judge reiterated:

The definition of the word "indefeasible" in the First Schedule of the Act empowers the defendants to challenge the certificate of title on the grounds that the plaintiff's title was superseded by a title acquired under section 2 Real Property Limitation Act. By section 33 of the *Title by Registration Act* Cap.56: 50 the person who claims to have acquired ownership of the land under the *Real Property Limitation Act* Cap. 54:07 cannot maintain an action in regard to that land until he has obtained a certificate of title in respect thereto from the Registrar. *The defendants may however by way of*

¹³ Dominica High Court Suit No 183 of 1995, Judgment delivered March 7, 1997; DM 1997 HC 1 (JustisOne)

¹⁴ Dominica High Court No. No. 590 of 1995, Judgment delivered November 21, 2000; DM 2000 HC 8 (JustisOne)

defence plead “adverse possession” to any action instituted by a person with the paper title (emphasis added).

- [20] *Laville v Hill*¹⁵ is yet another case where it was held that squatter’s rights had superseded the title of Sir Andrell Laville, a registered proprietor, to a portion of Sir Andrell’s estate. In that case, Rawlins J (as he then was) concluded:

I believe that Mr. Hill’s grandfather entered the land in or about 1956 as a squatter, so that Sir Andrell’s right to recover possession of the disputed land is statute barred and was so barred from about 1968.

- [21] The Court of Appeal’s decision in *Burton Riviere v Judith Durand*¹⁶ also supports the notion that the RPLA can be used effectively to block an owner from recovering land on the strength of a certificate of title. Chief Justice Brian Alleyne (Ag) affirmed a trial judge’s decision to hold, as statute barred, the claim of a registered proprietor to recover from a squatter possession of land that was encompassed within the claimant’s certificate of title. The Chief Justice was careful to note, however, that the trial judge could not grant the squatter a certificate of title for the land in question until and unless the squatter had complied with the section 33 procedure.

- [22] *Aldie Martina Toussaint v Mary Austrie*¹⁷ was a case where there was a dispute between two title certificate holders. The defendant’s boundary wall had, for more than 12 years, encroached upon land encompassed within the claimant’s certificate of title. Justice Cottle rightly held that the claimant was barred from successfully suing the defendant to recover possession of the portion that encroached on the land for which the claimant held a certificate of title.

- [23] The above cases confirm what an ordinary reading of the two statutes reveal. Firstly, the title of a registered proprietor that underlies the certificate is extinguished if the latter allows a squatter to be in possession of the disputed land for the statutory 12 year period. Secondly, such a squatter is unable to maintain,

¹⁵ Dominica High Court, DOMHCV 2001/0378, Judgment delivered May 29, 2003; DM 2003 HC 4 (JustisOne)

¹⁶ DOMHCVAP 2006/013, Judgment delivered November 10, 2010; DM 2010 CA 3 (JustisOne)

¹⁷ DOMHCV2003/0186, Judgment delivered 27 January 2012; DM 2012 HC 1 (JustisOne)

in the sense of commencing or instituting, an action against the registered proprietor without first availing herself or himself of the provisions of section 33 of the TRA. Thirdly, given the specifically stated second exception to the concept of indefeasibility, even if such a squatter has not availed herself or himself of the TRA section 33 procedure, the squatter is still entitled successfully to resist in court a claim by the registered proprietor for recovery of the land.

Discussion

[24] The courts below departed from the above conclusions. The Court of Appeal cited *Shillingford v The Attorney-General*¹⁸ in support of the notion that the Title by Registration Act “is unique in that the definition of “indefeasible” does not appear in other statutes which govern the Torrens system of Land Registration existing in other Commonwealth countries...” It was the view of the Court of Appeal that automatic extinguishment of title of the registered proprietor was impossible as this would render the TRA’s concept of indefeasibility of title sterile and also jeopardise one of the fundamental purposes of the Title by Registration Act, which is to provide certainty of title to land. The Court of Appeal neglected to appreciate that, as previously indicated, title certification in Dominica is not entirely indefeasible. It is the TRA itself that creates exceptions to the notion of indefeasibility and one of those exceptions is ownership acquired under the RPLA. The Court of Appeal failed to consider, firstly, that to determine the content of this exception, it is to the RPLA that one must turn and secondly, that, as noted earlier, the fundamental objective of the Torrens system has to do with avoiding the uncertainty, trouble and expense of investigating *the history* of the title of the registered proprietor.¹⁹

[25] A certificate granted to a registered proprietor provides a guarantee that at the time the title is obtained that title is good and free from defect. But, given the clearly stated exception the legislation provides, the indefeasibility cloak that

¹⁸ (1968) 12 WIR 57

¹⁹ See: *Gibbs v Messer* [1891] AC 248 at page 254

certificate affords does not protect the land owner from the risk that a squatter may, by 12 years of adverse possession, extinguish the content of the title of the registered proprietor. The issuance of a title certificate cannot, without more, protect a certificate holder against the risks that his title could be superseded in due course by rights acquired by a squatter. If a registered proprietor elects to discontinue possession, thereby enabling some person to obtain squatter's rights, then unless the legislature makes it specifically clear that no such adverse possession can defeat the title of the registered owner, the title of the registered proprietor will be superseded by the possessory rights of the squatter. In some Torrens enactments, adverse possession is considered an "overriding interest" in land. In Dominica it is stated differently. The Dominica legislation expressly states that adverse possession under the RPLA is an exception to indefeasibility.

[26] Before Antigua and Barbuda adopted a new Registered Land Act in 1975, that country's 1887 legislation mirrored the existing Dominica legislation. The 1887 Act also stated that registered title was indefeasible. Yet, in *Graham-Davis and Another v Charles and Others*,²⁰ the case from Antigua and Barbuda on which the Court of Appeal here relied, all the judges hearing the case (the trial judge, three Court of Appeal judges and the five judges of the Privy Council) permitted a squatter to resist a claim for recovery of land, the title to which was indefeasible under the Antigua and Barbuda Act. Since the Court of Appeal in this case held for Mr Guye on the strength of certain remarks made by Lord Jauncey in *Graham-Davis*, it is important to comment further on that case.

[27] In *Graham-Davis* there was a dispute over the ownership of a parcel of land called "the Bluff". The Bluff was originally a portion of a much larger estate. That estate was recorded in a Certificate of title dating back to 1926. According to the legislation existing at the time (the Antigua and Barbuda 1887 legislation) that certificate of title was "indefeasible". The appellants were registered proprietors having derived their title from the original registered owners. The respondents

²⁰ (1992) 43 WIR 188

claimed that notwithstanding the appellants' indefeasible registered title they had a superior title derived from the prescriptive possession of one John D. Charles. Mr Charles had been the overseer of the estate and had lived in a house on the Bluff for many years. In 1971 Mr Charles conveyed the Bluff to the respondents.

[28] The appellants' case was that in 1975 they purchased the Bluff from the persons who held the certificate of title for the estate. That same year, 1975, a new Land Registered Act was enacted. Proprietors of land were invited to have their titles registered under the provisions of the new Act. In instances where there was a dispute as to ownership, an adjudication officer was available to try to resolve the dispute so as to determine whose name should be recorded on the certificate of title that would be issued. There was an adjudication over the Bluff. The respondents asserted their possessory ownership claim. Notwithstanding the contentions of the respondents, in 1978 the adjudication officer granted a certificate of title in respect of the Bluff to the Appellants. The adjudication officer rightly took the view that, as he was not a judge, the new certificate of title under the new legislation should mirror the certificate under the old legislation. The adjudication officer bluntly left resolution of the dispute to the courts. He noted, however, that the successors in title of John D. Charles were maintaining that they and Mr Charles had successfully prescribed against the appellants' predecessors in title.

[29] The legal question for consideration before the courts was the same as the question before us in this case. The question was whether the title of the respondents (i.e. the successors in title of Mr Charles, the squatter), obtained under the Real Property Limitation Act (an Act similar to its Dominican counterpart), should prevail over the appellants' certificate of title. The Privy Council upheld the decisions of Byron J (as he then was) at first instance and of the Eastern Caribbean Court of Appeal that the registered title holder could not recover the land from the squatter's successors in title. John D. Charles had effectively prescribed against the appellants. He could only have done so under the old legislation that was identical to Dominica's. The appellants' supposedly

“indefeasible” certificate of title, first obtained by their predecessors in 1926, was superseded, defeated. This was a result that was fully in line with all the Dominican precedents cited above. So far so good.

- [30] In the course of his judgment, however, Lord Jauncey, writing for the Privy Council, made certain statements. In reference to the provisions of Antigua and Barbuda’s Title by Registration Act of 1887 (an Act that was also similar to its Dominican counterpart) and in particular to section 34 of that Act (which was identical to Dominica’s section 33) Lord Jauncey stated the following:

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 Act. No such supersession of the certificate of title of ... the appellants had taken place prior to the coming into effect in September 1975 of the new legislation governing registration of title. At that time the appellants had a certificate of title which was indefeasible as defined in the Title by Registration Act.²¹

- [31] Lord Jauncey’s comments do not form part of the basis for the decision of the Privy Council. They were unnecessary to the decision. Lawyers would refer to them as *obiter dicta*. Indeed, if those comments are interpreted in the manner in which the Court of Appeal in this case did, it is very apparent that they do not support the actual result in the case because, by giving judgment in favour of the respondents, the Privy Council was effectively affirming the notion that the rights of the squatter (i.e. Mr Charles) and his successors in title had prevailed in spite of the Appellants’ (and/or their predecessors’) “indefeasible” certificate of title obtained in 1926. Twelve years had not elapsed since the obtaining by the appellants of a new certificate of title under the 1975 Act. Like Mr George in this case, the squatters in *Graham-Davis* had not obtained any new certificate of title for the Bluff. They had not engaged the process analogous to section 33 (in Antigua’s old Act it is section 34). *The only premise* upon which the respondents

²¹ (1992) 43 WIR 188 at 196

in *Graham-Davis* could have succeeded in that case was that the registered proprietor whose certificate of title was supposedly indefeasible had lost ownership of the Bluff because John D. Charles had been in possession of it for a period in excess of 12 years. Lord Jauncey's comments are better interpreted to mean that the name attached to a registered title may only be replaced by the name of a squatter who has dispossessed the registered owner if the squatter has followed the section 33 (then 34 in Antigua) procedure. Indeed, later in the judgment, after noting that what we refer to here as squatters' rights were interests overriding the title of a registered owner, Lord Jauncey reaffirmed that the successors in title of John D. Charles

...did not lose any overriding interests which they or their predecessors in title possessed *at the date of the appellants' registration* and are in no way barred from seeking to enforce those interests. In the event of their success in this appeal it will be open to them to apply to the Registrar of Titles for registration as proprietors... (emphasis added)²²

[32] The Court of Appeal's reliance on *Graham-Davis* as support for the conclusions at which they arrived is mis-placed. But for that court's interpretation of Lord Jauncey's remarks earlier referenced the case is actually in line with the Dominica jurisprudence referred to above. An analysis of the TRA suggests that, in relation to the RPLA, the TRA does at least four things. Firstly, it affirms the RPLA and the rights given to squatters under the RPLA. Secondly, it expressly provides that these rights are an exception to the indefeasibility of the title it grants to registered proprietors. Thirdly, it provides a process whereby a squatter is allowed the sensible option of converting her or his RPLA rights (which previously resided purely within a legal concept) into a tangible and registered certificate of title. And fourthly, it clothes any certificate of title so obtained with the same blanket of indefeasibility as a certificate of title obtained by some other auspicious mode.

[33] Both courts below in this case held that a squatter's RPLA ownership rights are effective against an unregistered proprietor, but that those same ownership rights

²² (1992) 43 WIR 188 at 199

could not, by themselves, prevail against a registered owner. We would have expected clear and explicit language in the TRA to yield the result that it relegates a Limitation Act to being inapplicable to one class of land owners (those with registered title) while still being fully applicable to a different class of owners (those who do not have a registered title).

[34] Some may consider that the concept of the indefeasibility of a registered title, with all the commercial advantages that possession of a certificate of title should bring, sits uneasily with the idea of adverse possession superseding such a title. But, for better or worse, that is precisely and expressly what the TRA allows. If this seems odd, then it is for the Parliament to address that seeming contradiction by removing or qualifying the second exception to indefeasibility. Some States have adopted that approach. The United Kingdom Parliament, for example, did so in 2002.²³

[35] We specifically disagree with any notion that it is the process outlined in section 33 of the TRA that constitutes the second exception to indefeasibility. When a squatter successfully navigates the section 33 process and s/he obtains a certificate of title, the certificate so obtained is not *an exception* to the indefeasibility of any other title. *It is itself indefeasible*, as all certificates of title under the TRA are. And it too will be subject to the two listed exceptions. If it was obtained fraudulently it can be annulled. If the certificate holder discontinues possession of the land to which the certificate relates and a squatter maintains possession for over 12 years, then the certificate owner's title would be extinguished.

[36] Section 33 may only properly be triggered if a squatter has already acquired a form of ownership under the RPLA. The only basis on which "S", a squatter, can successfully pursue the section 33 process is that S's adverse possession has extinguished the legal sub-stratum of the title of "R", the registered proprietor.

²³ See Land Registration Act 2002 (UK)

Assuming, as is the case here, that S has been on R's land for over 12 years but has not pursued section 33, why should the court deny S's ability successfully to defend himself against a suit brought by R when R's title has already been extinguished and it is a mere matter of administrative processing for S to get a certificate of title through the section 33 process? If the Court of Appeal is right and, in this case, S is unable successfully to resist R's claims, the natural result is that, upon filing suit against S, R's extinguished title magically gets a new lease on life. But on the contrary, if, after the 12 year period, S is astute to pursue the section 33 procedure, then R's title remains extinguished so enabling S to obtain a new certificate of title in place of R's. We respectfully disagree with such reasoning.

[37] To use the metaphor of armaments, at the point in time when the squatter seeks to engage section 33 of the TRA the squatter is already outfitted, but only with a shield, albeit one that is effective against the registered proprietor and anyone else who is unable to demonstrate a title that is better than the squatter's. That mere shield may disentitle the squatter from enjoying in the commercial world all the advantages possessed by a certificate title owner. A reputable financial house, for example, may be reluctant to advance funds on the strength of that form of land ownership, especially as the register will indicate the name of someone else as holding the title for the land in question. The TRA makes provision for resolving this dilemma and for bringing the Register into harmony with the state of play on the ground. The TRA entitles the squatter, through the section 33 process, to be armed with a sword to accompany the shield. Fortified with a certificate of title, the erstwhile squatter becomes a title certificate holder with all the commercial advantages this entails.

[38] In all the circumstances we would allow the appeal and make the orders set out at [134] below. We have no doubt that the Registrar of Titles will note this judgment on the title of Mr Guye.

**CONCURRING JUDGMENT OF THE HONOURABLE MME JUSTICE
RAJNAUTH-LEE, JCCJ:**

[39] I have read the judgment of the Honourable President of the Court, Mr Justice Saunders, and I am fully in agreement with it. This appeal is the first of its type from the Commonwealth of Dominica that raises the important issue of the meaning of the concept of indefeasibility as it relates to the certificate of title of the registered proprietor in circumstances where it is undisputed that a person has been in possession of the land in question for over twelve years.

[40] In Dominica, the Real Property Limitation Act intersects with the Title by Registration Act in the First Schedule of the Title by Registration Act. The First Schedule contains the important definition of the term “Indefeasible”.

[41] In the First Schedule, “Indefeasible” is defined as follows:

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 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.

[42] Accordingly, in the Commonwealth of Dominica, a certificate of title issued under the Title by Registration Act can be challenged in court on two grounds only (i) fraud connected with the issue of the certificate of title, or the noting of the mortgages or incumbrances, or (ii) that the title of the registered proprietor has been superseded by a title acquired under the Real Property Limitation Act, by the person making the challenge. These comprise the only statutory exceptions to the indefeasibility of a certificate of title of the registered proprietor. It is with the second statutory exception that we are concerned.

- [43] It is important to note that the definition of indefeasibility provides for the supersession of the certificate of title of the registered proprietor where the person making the challenge has acquired a title ***under the Real Property Limitation Act***. The definition does not require a title acquired under the Title by Registration Act or the triggering of section 33 of the Title by Registration Act in order for the statutory exception to take effect.
- [44] By section 2 of the Real Property Limitation Act, it is provided, and I summarize, that no person shall bring an action or suit to recover any land but within twelve years next after the time at which the right to bring the action or suit has first accrued to some person through whom he claims or to the person making or bringing the action or suit. In addition, the Real Property Limitation Act, at section 10, incorporates the 1833 Limitation Act of the United Kingdom. Accordingly, under the Real Property Limitation Act of Dominica, not only has the paper title owner's right to bring an action against the person in possession been barred, but the right and title of the paper title owner have been extinguished.
- [45] By section 33 of the Title by Registration Act, a person who claims to have acquired under the Real Property Limitation Act, the ownership of land (which has been brought under the operation of the Title by Registration Act) can present a request to the Registrar of Titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title. This is a separate and specific procedure recognized by section 33 by which a certificate of title can be issued to a person claiming to have acquired ownership of registered lands under the Real Property Limitation Act. After the request is made to the Registrar of Titles, the Registrar of Titles is obligated under section 33 to state a case to the High Court, and cannot issue a certificate of title to the person making the request, until the Registrar receives the directions of the Court.
- [46] In addition, section 33 provides that the person who has acquired, or claims to have acquired, the ownership of such land, shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title. This statutory

provision is clear and straightforward. In order to maintain or commence a suit or an action relating to the land, the person must have utilized the section 33 procedure, and must have obtained a certificate of title. In that case therefore, the person who has triggered section 33, obtains a certificate of title in respect to the land, and relies on that registered title to bring an action in respect of the land.

[47] On the other hand, as pointed out earlier, the First Schedule provides a statutory exception to the concept of indefeasibility of the certificate of title without any requirement that the person making the challenge, pursue or trigger the section 33 procedure. In my view, this is a significant distinction. In this regard, I agree with Saunders PCCJ that the case law coming out of Dominica, from the trial courts and the Court of Appeal, confirms, among other things, that a person who has been in possession of the land in question for the period prescribed in the Real Property Limitation Act, cannot commence a claim against the registered proprietor without availing himself of the section 33 procedure, but can use that possessory title or squatter's title as a defence to a claim brought against him by the registered proprietor for recovery of the land.

[48] It is interesting to consider Dr Lloyd Barnett's work entitled "The Jamaican Land Registration System and Possessory Titles".²⁴ Dr Barnett considered the social context of the Torrens System which was implemented in Jamaica by virtue of the Registration of Titles Act in 1889. Dr Barnett makes the point that registration is in itself the critical factor in its validity. He also argues that ***the major practical qualification of the principle of indefeasibility is the possessory title.***²⁵ He argues for the importance of the possessory title as the major qualification of the principle of indefeasibility especially in light of the social circumstances of Jamaica at the time; the number of landowners who had migrated, the shortages and high cost of good agricultural or building land, the widespread squatting on lands which prevailed throughout Jamaica, and the highly developed techniques for capturing land.

²⁴ (1998) WILJ 72

²⁵ Emphasis added

[49] Whilst it must be noted that the Jamaica legislation²⁶ is not identical to the legislation before the Court, it is still useful to note Dr Barnett's comments as they relate to the Torrens System and the possessory title. He observes:²⁷

Time under the Limitation Act begins to run against the owner of land and in favour of the person who takes possession adverse to him immediately on the former discontinuing his possession or being dispossessed. The basic principles apply whether the land is registered or unregistered.

[50] It is important to bear in mind that the definition of "Indefeasible" in the First Schedule makes it clear that the Real Property Limitation Act applies to land which is subject to the Title by Registration Act. To this extent, I agree with the statement made by Dr Barnett above, and the submission made by Mr Justin Simon Q.C. and Mrs Gina Dyer Munro, Counsel for the Appellant, that the Real Property Limitation Act "applies to both registered and unregistered land."²⁸

[51] I therefore agree with Saunders PCCJ that the Appellant was entitled to use the title acquired under the Real Property Limitation Act to defend the action commenced by the Respondent for recovery of possession of the disputed land. In addition, I bear in mind that having considered the evidence, Cottle J, the trial judge, was satisfied that the Appellant had been in possession of the land for the statutorily prescribed period.²⁹

[52] In the circumstances, I agree that the appeal must succeed, and that the orders set out at [134] shall be made.

**DISSENTING JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON,
JCCJ:**

Introduction

[53] This is an appeal from a decision of the Court of Appeal of the Eastern Caribbean Supreme Court dated 12 June 2017. It raises the important issue of whether a

²⁶ Sections 68-71 of the Registration of Titles Act, 1889

²⁷ (1998) WILJ 72 at paragraph 8

²⁸ See Appellant's Submissions in Reply, para 4 (filed on the 27 March 2019)

²⁹ Claim No. DOMHCV2007/0400 at [11]

person is entitled to a declaration permitting that person to remain in occupation of land in Dominica on the basis of adverse possession despite the assertion of the right to possession by the registered owner of the land who has the certificate of title to the land. A decision on this issue is of significance not just to Dominica but also to other jurisdictions in the Caribbean with legislative provisions that are for all practical purposes identical to those in Dominica. The result of the appeal also has relevance for the future relationships of the Court of Appeal of the Eastern Caribbean Supreme Court with the Judicial Committee of the Privy Council and with this Court, the Caribbean Court of Justice.

The Facts

[54] The Appellant was the owner of Lot 750 in the Pottersville Housing area of Roseau from which he had long carried on a tyre repair business. The Respondent was the registered owner of adjoining Lot 748 on which he recently started a competing tyre repair business. The Appellant occupied the disputed strip of land which laid between the two business but formed which part of the land comprised in the Respondent's lot. In response to the claim by the Respondent for possession of the strip and consequential relief the Appellant sought a declaration entitling him to remain in possession of the strip on the basis that he and his predecessors in title had been in occupation for more than 30 years and that he was entitled to the protection granted to adverse possessors under the Real Property Limitation Act 1877.³⁰ Cottle J. held in favour of the Respondent. The Appellant's appeal to the Court of Appeal was unanimously rejected in an opinion delivered by Baptiste JA. The Appellant now renews his appeal to this Court.

Decision

[55] I consider that the appeal must also fail in this Court substantially for the reasons given by Baptiste JA in his brilliantly clear and admirably reasoned judgment in the Court of Appeal. Like the Learned Justice of Appeal, I am of the view that

³⁰ Chapter 54:07 of the laws of Dominica, (also referred to as the "RPLA")

the case turns on the Torrens system of land title established in Dominica by the Title by Registration Act 1886.³¹ To the extent there is any conflict between the Title by Registration Act 1886 and the earlier Real Property Act 1873,³² the former, embodying the Torrens system, must prevail.

Torrens system

[56] Under the old system legislated in the Real Property Act 1873, which still exists in relation to unregistered land in Dominica, the transferee of land acquired a dependent title that was only as good as the title of the transferor and therefore of the predecessors in title of the transferor. The transferee had to be satisfied that he or she had a good root of title that could stand up against any other claimant. For this reason, the system was inherently unstable.

[57] The Torrens system introduced title by registration whereby title is determined by the registration as title holder in a centrally and bureaucratically administered system. The title of the person registered as the title holder is not dependent on the title of his or her predecessors. As explained by James Hogg in his *Yale Law Journal* article published in 1918,³³ the registration of title was a system of conveyancing which was meant to supersede the ordinary method of conveyance by execution of a deed only. Whereas ordinary deed registration did not pass property but merely made the grantee more secure, registration of title was intended to confer title by the fact of registration. In *Breskvar v Wall*³⁴ Barwick CJ confirmed that:

The Torrens system of registered title ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.³⁵

³¹ Chapter 56:50 of the laws of Dominica, enacted in 1886 and amended in 1887 and 1889, until Law Reform in 1990

³² Act No. 6 of 1873

³³ James Edward Hogg, "Registration of the title to Land" (1918) Vol. 28 No. 1, *The Yale Law Journal*, 51-58, at p. 51

³⁴ (1971) 126 CLR 376

³⁵ *ibid* at p. 6

Indefeasibility and Supersession as an Exception to Indefeasibility

[58] Title by registration is buttressed by the statutory provision that such title “shall be indefeasible”³⁶ which aids in the stability and security of title and hence certainty of land transactions and more broadly economic development. The First Schedule of the Act defines “indefeasible” to mean that the certificate of title issued by the Registrar of Titles cannot be challenged in any court of law on the ground that some person is the true owner of the land therein set forth. Section 10 of the Title by Registration Act spells out the rights of a registered proprietor in the following words:

The right of the registered proprietor named in the 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...

[59] As one of two exceptions to the indefeasibility of the registered title, the Title by Registration Act allows challenge on the ground “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.”³⁷ The critical issue, therefore, is to determine the circumstances in which the title of the registered owner is thus superseded; until and unless such supersession occurs the Section 10 rights of the registered proprietor persist.

[60] In coming to the determination that supersession has occurred, it is prudent to bear in mind that as an exception to the statutory regime of indefeasibility of title, supersession must be construed narrowly.³⁸ In this regard the wording of the supersession exception to indefeasibility is significant. What supersedes the registered title is *not* a right or claim of beneficial interest or ownership of land or a right or claim to a defence from eviction. Rather, supersession occurs

³⁶ Section 8, Title by Registration Act, Chap. 56:50 (also referred to as the “TRA”).

³⁷ First Schedule of the TRA

³⁸ *Minister of Home Affairs v Fisher* (1979) 3 All ER 21; *Mullins v Surrey Treasurer* (1880) 5 QBD 170 at 173; *West Derby Union v Metropolitan Life Assurance Society* [1897] AC 647 at 652; *Re Memco Engineering Ltd* [1986] Ch 86 at 98; *Graham Davis & Another v Charles and Others* (1992) 43 WIR 188; *Burton Riviere v Judith Durand* DOMHCVAP2006/013

pursuant to the *title* acquired under the Real Property Limitation Act. There is a provision in the Title by Registration Act which provides the procedure by which any beneficial interest or ownership under the Real Property Limitation Act may be converted into a title. That provision is section 33 of the Title by Registration Act which states that:

Where any person has acquired, or claims to have acquired under the Real Property Limitation Act, the *ownership* of land brought upon the operation of this Act, he shall present a request to the Registrar of Titles *to have a certificate of title issued to him in lieu of the registered proprietor* in the original certificate of title, and the person who has acquired, or claims to have acquired, the *ownership shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title* thereto. When a request for such a certificate of title is presented to the Registrar of Titles, he shall state a case to the Court, and shall not issue a certificate of title on the request until he has received the direction of the Court thereon.³⁹

[61] Section 33 of the Title by Registration Act describes the process by which title acquired under the earlier Real Property Limitation Act supersedes the registered title: *Burton Riviere v Judith Durand*.⁴⁰ That process must logically discipline the operation of sections 2 and 10 of the Real Property Limitation Act which provide for the automatic extinguishment of the right and title of the registered proprietor after the expiry of the limitation period. As Justice of Appeal Baptiste puts it, the automatic extinguishment of the right and title of the registered proprietor:

... would not be in sync with the tenor of the Title by Registration Act. In light of section 33, it would be impracticable to contend in favour of automatic extinguishment of title of the registered proprietor as this would render the section sterile or nugatory. In my judgment, automatic extinguishment of title would also jeopardise of the basal purposes of the Title by Registration Act, which is to provide certainty of title to land. In the circumstances of this case, it would mean that though the respondent's title is indefeasible, his right and title would be extinguished at the end of the limitation period, without the procedure for acquiring prescriptive title under section 33 having been employed. That situation would be both untenable and illogical.⁴¹

³⁹ Emphasis added

⁴⁰ DOMHCVAP 2006/013, Judgment delivered November 10, 2010, DM 2010 CA 3. (JustisOne)

⁴¹ *ibid* at [44]

Discussion of the cases

- [62] There are unreported cases at first instance which have decided that a title holder of registered land was not entitled to evict persons in adverse possession for the prescribed limitation period. In *Phillips v James*⁴² and *Castaways Development Ltd v Castaways Hotel Ltd et al*,⁴³ Cenac J expressed the view that a registered proprietor could not recover possession from a squatter after the prescription period. The decisions in *Green v Joseph*⁴⁴ and *Laville v Hill*⁴⁵ contain statements to a similar effect. However, in none of these cases was the relevance of supersession in accordance with section 33 fully argued or was the reconciliation of any conflict between the two statutory regimes in favour of the later statute, expressly considered.
- [63] The predominant view taken by cases decided at the appellate level is that the rights of the registered titled proprietor remain indefeasible except where the two narrow exceptions are strictly complied with. In *Shillingford v The Attorney-General of Dominica*⁴⁶ the Court of Appeal emphasized that Section 10 of the Title by Registration Act expressly defined the plenitude of the right in registered land which registration conferred upon a registered proprietor by reference to the law of England. Section 10 equated the right of the registered proprietor to the fullest and most unqualified right which can be held in land by any subject of the Crown under English law. The words ‘the certificate of title being issued by the Government of the colony’ appearing in the definition of ‘indefeasible’ created a statutory guarantee by the Government to support and maintain the registered proprietor’s title which is intended to be effective not only between subject and subject but also as between the Crown and subject.

⁴² Dominica High Court Suit No. 183 of 1995, Judgment delivered 7 March 1997, DM 1997 HC 1 (JustisOne)

⁴³ Dominica High Court Suit No. 590 of 1995, Judgment delivered 21 November 2000; DM 2000 HC8 (JustisOne).

⁴⁴ Dominica High Court, Suit 277 of 1987, Judgment delivered on 30 July 1990; DM 1990 HC 7 (JustisOne).

⁴⁵ Dominica High Court, DOMHCV 2001/0378, Judgment delivered 29 May 2003; DM 2003 (JustisOne) per Rawlins J (as he then was)

⁴⁶ (1968) 12 WIR 57

[64] The case of *George v Rosalie Estates Ltd*⁴⁷ was a decision specifically on the relationship between indefeasibility and adverse possession. The Appellant initiated legal proceedings in 1962 against the Respondent in trespass alleging that he and his predecessors had been in possession of 5.85 acres of the Rosalie Estate in Dominica for over 30 years and had thus acquired a title by prescription. The Respondent held a certificate of title in respect of the estate issued in 1952 and at the trial took the preliminary point that the cause of action had not accrued at the date of the alleged trespass. This contention was upheld, and the judge gave judgment for the respondent.

[65] On appeal the appellant argued that the respondent's title had been superseded by section 2 of the RPLA and that although the appellant had no certificate of title at the time of the alleged trespass he could nevertheless bring his action despite the provision of section 33 of the TRA. This was so, it was alleged, because the word "maintain" in section 33 meant *continue* and not *commence*, therefore a person in the appellant's position could bring an action of trespass without having at the time a certificate of title but could not succeed unless he obtained such a certificate. The British Caribbean Court of Appeal held that the certificate of title issued to the respondent company gave the company an indefeasible title to the land and therefore whatever inchoate rights were then possessed by the appellant or his predecessors were unenforceable while the company enjoyed the indefeasibility guaranteed it by the certificate. The Court of Appeal held:

We were not told why and in what circumstances the respondent suffered a loss of 5.85 acres of its land in October, 1962, but the conclusion to be drawn...is certainly that the status of the appellant in 1956 and on March 31, 1962, was that of a person who could not have had a cause of action in trespass against the respondent, the registered proprietor of the land, and there is no doctrine of relation back which can be called in aid to place the appellant in the position he would have been if he had obtained a certificate of title before June, 1956. *The issue of a certificate of title to him on October 9, 1962 is some indication that he had a right to rectification of the register before that date*, but the important date was October 9, 1962, when he obtained the certificate and not May 14, 1960, the date on which the

⁴⁷ (1965) 13 WIR 401

Registrar of Titles subscribed his name and affixed his seal of office to the certificate, or any earlier date. *Until the register was rectified the respondent's title was unimpaired and nothing had happened to detract in the slightest degree from its indefeasibility.*⁴⁸

[66] The Court of Appeal was of the view that the prescription period had not expired even on October 9, 1962 but made clear that, in any event,

... extinction of the respondent's title would have been of no avail to the appellant unless followed by rectification of the register. The decision in *Ingall v. Moran* ... rests on the ground that an administrator is not entitled to sue in the Queen's Bench Division until administration is granted because he derives his title solely under the grant. The appellant derived title under the certificate of title issued on October 9, 1962, he was a person qualifying for a title by adverse possession but powerless to defeat the registered proprietor of the land.

[67] *Graham-Davis v Charles*⁴⁹ was a decision of the Privy Council on appeal from Antigua and Barbuda in which the Title by Registration Act and the Real Property Limitation Act of that state were traversed. The relevant provisions of both Acts were identical to those of their counterparts in Dominica. The dispute concerned ownership of 10.9 acres of land called "the Bluff" which was originally part of a 407 acres estate recorded in a Certificate of title dating back to 1926. The appellants claimed to be the owners and to be entitled to possession of the Bluff by virtue of their certificate of title consequent upon a memorandum of transfer on sale to them of 7th July 1975 from Mrs Joyal of the Bluff. In September 1975 a new system of land registration was introduced in Antigua and Barbuda by the Land Registered Act and proprietors of land were invited to have their titles registered under the new Act. The appellants obtained registration in the Land Register as absolute proprietors of the Bluff on 24th October 1978. The case for the respondents was that, notwithstanding the appellants registered title, they had a superior title derived from the prescriptive possession of one John D. Charles who had, during 1971, granted conveyances covering the whole of the Bluff to the respondents or their predecessors in title.

⁴⁸ *ibid*, at p. 409 (Emphasis added)

⁴⁹ (1992) 43 WIR 188

- [68] The Privy Council, upholding the decision of Byron J (as he then was) and of the Eastern Caribbean Court of Appeal, dismissed the claim of the appellants that they were the owners of the Bluff and upheld the counterclaim of the respondents that John D. Charles had effectively prescribed against the appellants. In effect the appellants' indefeasible title first obtained by their predecessors in 1926 had been defeated by the respondents' adverse possessory interest.
- [69] The Privy Council was clear that this result was specifically directed by the new 1975 legislation embodied in the two statutes pursuant to the policy of transitioning from the prior to the current system of land registration. The Land Adjudication Act made provision for the adjudication of rights and interests in land which could thereafter be registered under the Registered Land Act. Section 28 of the Registered Land Act provided that all registered land "shall be subject to" adverse prescriptive rights acquired or in process of being acquired and the rights of a person in actual occupation of land. This was an eminently logical approach since many of the overriding interests detailed in section 28 were of a character that might not be apparent to an officer visiting the land in the performance of his duties under the Land Adjudication Act. It would have been manifestly unfair that a person who had acquired or was in the process of acquiring an overriding interest in a parcel of land should forfeit such interests simply because he had not become aware of the publication of the statutory notice by the adjudication officer. Section 28 of the Registered Land Act was therefore designed to avoid such unfairness.
- [70] It would therefore appear that that decision, based on an express statutory directive in the context of transitioning to a new land registration system has no applicability to the general question of whether the title of certified registered owner is superseded simply by the fact of adverse possession. Having examined section 2 of the Real Property Limitation Act of Antigua and Barbuda (which is identical to section 2 of the Real Property Limitation Act of Dominica), and section 34 of the Title by Registration Act of Antigua and Barbuda (which is also

in identical language to section 33 of the Title by Registration Act of Dominica) the Board 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 Act*. No such supersession of the certificate of Mrs Joyal or of the appellants had taken place prior to the coming into effect in September 1975 of the new legislation governing registration of title. At that time the appellants had a certificate of title which was indefeasible as defined in the Title by Registration Act.⁵⁰

Rules of precedent: Relationship Between the Court of Appeal and Privy Council/ CCJ

[71] The decision of the Privy Council in *Graham-Davis v Charles* has significance beyond its persuasive value in confirming that the title of the registered proprietor can only be superseded by a title acquired pursuant to section 33 of the Title by Registration Act. The Privy Council was the final appellate court for Dominica until 2015 when it was replaced by this Court, and it remains the final appellate court for the other 8 Member States and Territories of the Eastern Caribbean Supreme Court. In respect of these 8 jurisdictions the decisions of Privy Council are binding upon the High Court and the Court of Appeal of the Eastern Caribbean Supreme Court. In the present appeal, the Court of Appeal was persuaded to adopt the Privy Council's opinion on the interpretation of section 33; in any other appeal the Court of Appeal may well be bound to do so.

[72] In *Attorney-General v Joseph and Boyce*⁵¹ this Court laid down the rules governing its relationship with previous judgements of the Privy Council in light of the fact that this Court had replaced the Privy Council as the final appellate court for Barbados. Referring to the fact that the main purpose in establishing this Court was to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts were best equipped to pursue, de la Bastide P and

⁵⁰ *ibid* at p. 196

⁵¹ (2006) 69 WIR 104; [2006] CCJ 3 (AJ) at [17]-[18]

Saunders JCCJ (as he then was) indicated that this Court would naturally consider very carefully and respectfully particularly, the judgments of the Privy Council which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. Furthermore, decisions made by the Privy Council while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados and continue to be binding in Barbados, notwithstanding the replacement of the Privy Council, until and unless they are overruled by this court.

- [73] These strictures apply with equal or greater force in relation to the Court of Appeal of the Eastern Caribbean Supreme Court which continues to be bound by decisions of the Privy Council in respect of all its jurisdictions except Dominica. In order not to place that court in the unenviable position of serving two discordant masters, so to speak, judicial comity and judicial policy both dictate that this Court ought not to overrule decisions of the Privy Council binding upon the Court of Appeal of the Eastern Caribbean Supreme Court unless convinced that those decisions are plainly wrong or otherwise intolerably inconsistent with the development of indigenous Caribbean jurisprudence. It may also be necessary to give further consideration as to whether it would be wise, unless unavoidable for the reasons just given, to introduce idiosyncratic conveyancing rules into Dominica when compared with the other participants in the cohesive OECS Economic Union created by the Revised Treaty of Basseterre.⁵²

Conclusion

- [74] In the present appeal the appellant did not avail himself of the avenue available to him under section 33 of the Title by Registration Act to supersede the title of the respondent. I am of the view that the appeal must be dismissed.

⁵² The Revised Treaty of Basseterre, which established the OECS Economic Union, was signed on 18 June 2010 and entered into force on 21 January 2011.

**DISSENTING JUDGMENT OF THE HONOURABLE MR JUSTICE BURGESS,
JCCJ:**

Introduction

[75] This appeal raises the complex but very consequential issue for land law and conveyancing in the Commonwealth of Dominica of whether compliance with *section 33* of the *Title by Registration Act Chapter 56:60* is a pre-condition to invoking as a defence adverse possession pursuant to the *Real Property Limitation Act Chapter 54:07*. The answer to that knotty question is determinative of the immediate matter of contention in this case. It is whether the failure of the appellant, a person in adverse possession who failed to comply with *section 33* of the *Title by Registration Act*, can nevertheless plead his adverse possession as a defence in an action in trespass against him by the respondent, the registered proprietor who, under the *Title by Registration Act*, held an indefeasible certificate of title to the land in dispute.

The Statutory Framework

[76] It is apparent from the foregoing that the *Title by Registration Act* and the *Real Property Limitation Act* constitute essential background to the appeal before us. In this regard, it is agreed on all sides that the key provisions of these Acts for purposes of this appeal are respectively, *sections 8, 10 and 33* of the *Title by Registration Act* and *the First Schedule* to that Act and *sections 2 and 10* of the *Real Property Limitation Act*. Accordingly, I consider it advantageous to begin by setting out these provisions in extenso.

[77] The *Title by Registration Act* was enacted into law in the Commonwealth of Dominica in 1886. *Section 8* of that Act stipulates as to the legal nature of a certificate of title granted under that Act. *Section 8* provides:

8. All certificates of titles granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible.

[78] The *First Schedule* to the Act defines “indefeasibility” as follows:

INDEFEASIBLE. 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 or 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.

[79] Section 10 sets out the rights of a registered proprietor named in a certificate of title. That section states as follows:

The right of a 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...

[80] Section 33 of the Act deals with the acquisition of a certificate of title by an adverse possessor in lieu of the registered proprietor. It reads:

33. Where any person has acquired, or claims to have acquired under the Real Property Limitation Act, the ownership of land brought upon the operation of this Act, he shall present a request to the Registrar of Titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title, and the person who has acquired, or claims to have acquired, the ownership shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title thereto. When a request for such a certificate of title is presented to the Registrar of Titles, he shall state a case to the court, and shall not issue a certificate of title on the request until he has received the direction of the Court thereupon.

[81] Sections 2 and 10 of the *Real Property Limitation Act* make provision for the limitation period for recovery of land to be twelve (12) years. In doing so, *section 10* incorporates the 1833 Limitation Act of the United Kingdom. By virtue of *section 10* also, Section XXXIV (34) of the English Real Property Limitation Act⁵³ passed in the 3rd and 4th year of the reign of King William the Fourth is incorporated into the *Real Property Limitation Act*.

[82] Sections 2 and 10 provide as follows:

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 through whom he claims; or if the right has not accrued to any person through whom he claims, then within twelve years next after time at which the right to make an entry or distress, or to bring the action or suit has first accrued to the person making or bringing the same.

10. From and after the commencement of this Act, all the provisions of the United Kingdom Act passed in the session of the third and fourth years of the reign of King William the Fourth, Chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall be in full force in the State, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in that Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight and forty respectively, and as if the term of six years had been mentioned, Instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period twenty years; and the provisions of the United Kingdom Act passed in the session of the seventh year of the reign of King William the Fourth and the first year of the reign of Queen Victoria, chapter twenty-eight, shall hereafter be deemed to be in force in the State, and shall be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

[83] Section XXXIV of the 1833 Real Property Limitation Act of the United Kingdom provides:

XXXIV That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or

⁵³ Section XXXIV (34) 3 & 4 Wm 4 c. 27

adwoson for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period shall be extinguished.

The Factual and Procedural Background

- [84] Against that statutory backdrop, I now turn to outlining the factual and procedural background to this appeal.
- [85] The respondent, Mr Albert Guye, is the registered proprietor of a portion of land known as Lot S. 748 in Pottersville Housing Scheme. Mr Guye purchased the land in 1995. In 1996, the land was registered in the register of titles and a certificate of title issued to him pursuant to the *Title by Registration Act*.
- [86] The appellant, David George, the successor in title of his father, John George, presently operates, and had operated for some time, a tyre repair service called “John Tyre Repair Service” on property adjacent to Lot S. 748. The property occupied by the appellant is known as Lot S. 750 and is registered in the register of titles in the name of his deceased father.
- [87] The appellant occupies a strip of land between Lot S. 748 and Lot S. 750 (the disputed strip of land) in the conduct of his tyre service business. The disputed strip of land is part of the land comprised in the certificate of title of the respondent.
- [88] Prior to his purchase of Lot S. 748, the respondent had been employed for many years at the appellant’s tyre repair business. Indeed, at the time of that purchase, the respondent operated as manager of that business. He continued in that position until sometime in 2004, when differences arose between himself and the appellant. The respondent then left the appellant’s business and set up and began operating a rival tyre repair shop called “Alby’s Tyre Service”.
- [89] In 2007, the respondent instituted an action in the High Court claiming that he was the registered proprietor in possession at all material times of the disputed

strip of land. On this basis, he sought a declaration that the appellant was not entitled to enter or remain on the disputed strip of land and further that the appellant be ordered to remove a wooden shed erected on the disputed strip of land and to vacate that land.

[90] In his defence, the appellant pleaded that he was entitled to have and remain in possession of the disputed strip of land since the respondent was barred from bringing the action by virtue of the operation of the *Real Property Limitation Act*. According to the appellant, this was so because his predecessors had been in undisputed possession of the disputed strip of land for about 30 years. The appellant further claimed that the respondent was estopped by conduct from claiming entitlement to the disputed strip of land. The appellant also filed a counterclaim seeking kindred declarations.

[91] The case was heard before Cottle J in the High Court. He held that, notwithstanding his finding that the appellant and his predecessors in title were in adverse possession of the disputed land for more than 12 years, judgment would be granted in favour of the respondent. The judge held that *section 2 of Real Property Limitation Act* did not avail the appellant, as the appellant did not invoke *section 33 of the Title by Registration Act* to have a certificate of title issued to him in lieu of the respondent. Consequently, according to the judge, the respondent's certificate of title was indefeasible.

[92] At paras [16] and [17] of his judgment, Cottle J reasoned as follows:

[16] ...I interpret the position to be that an owner of land who does not hold a certificate of title is prevented from bringing an action to evict a squatter after 12 years of adverse possession.

[17] However, if he holds a certificate of title he can rely on the indefeasibility conferred by his certificate of title unless the squatter obtains the title under the *Real Property Limitation Act* by applying for such a title under the provision of s.34 (sic) of the *Title by Registration Act*.

[93] Cottle J also dismissed the appellant's counterclaim in which he sought declarations that he was entitled to remain in possession of the disputed land.

[94] The judgment of Cottle J was appealed by the appellant to the Court of Appeal of Eastern Caribbean Supreme Court Commonwealth of Dominica (Court of Appeal). That Court upheld the decision of Cottle J and dismissed the appeal. Baptiste JA, in delivering the judgment of the Court of Appeal, held at para [43] as follows:

[43] ...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 appellant not having invoked section 33, the respondent's title was not superseded by the title acquired under the *Real Property Limitation Act*. 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. The respondent is protected by his indefeasibility of title and no issue can arise 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.

THE APPEAL TO THIS COURT

The Issues in the Appeal

[95] On the 27 June 2018, the appellant filed a notice of appeal in this Court against the whole judgment of the Court of Appeal. In that notice of appeal, the appellant raised nine grounds of appeal. However, the written and oral submissions of Mr Simon QC for the appellant, to which Mr Bruney for the respondent replied, make it plain that, as already has been intimated, the dispositive issue in this appeal is encapsulated in this central question: Can the appellant invoke adverse possession as a defence pursuant to the *Real Property Limitation Act* notwithstanding his non-compliance with section 33 of the *Title by Registration Act*?

[96] In light of counsel's submissions on that question, it is my judgment that three undisputed facets of this case are of surpassing importance in approaching the determination of that question. The first is that Cottle J found the appellant to be in adverse possession for over 12 years. The second is that the respondent was issued a certificate of title by the Registrar in 1996 which encompassed the disputed strip of land. The third is that the appellant never complied with *section 33 of the Title by Registration Act* but yet claim to raise his adverse possession as a defence.

[97] It is my further judgment that, given these considerations, the central question in this case can best be resolved by having regard to three interrelated subsidiary questions. These are:

- (i) what is the legal effect of the appellant's adverse possession pursuant to *sections 2 and 10 of the Real Property Limitation Act*;
- (ii) what is the legal effect of the appellant's adverse possession on the respondent's certificate of title under the *Title by Registration Act*; and
- (iii) whether the defence of adverse possession is available to the appellant his having not complied with *section 33 of the Title by Registration Act*?

[98] These subsidiary questions will next be addressed seriatim.

Analysis and Conclusions

The legal effect of the appellant's adverse possession pursuant to sections 2 and 10 of the Real Property Limitation Act

[99] The cornerstone of the appellant's case before this Court is that the Court of Appeal erred in holding that his undisputed adverse possession did not have the legal effect of extinguishing the right and title of the respondent. Mr Simon QC, counsel for the appellant, argued that that holding of the Court of Appeal was not sustainable on a proper interpretation of *sections 2 and 10 of the Real Property*

Limitation Act. According to Mr Simon QC, such an interpretation requires that those provisions must be read together. So read, Mr Simon QC submitted, sections 2 and 10 bar the bringing of any action for the recovery of land after the statutorily prescribed period of twelve years running from the date when the right of action first accrued and has the effect that at the termination of the twelve years the action for recovery becomes statute-barred. In turn, by section XXXIV of the 1833 UK Limitation Act, incorporated into the law of the Commonwealth of Dominica by section 10, when the action for recovery is barred, the remedy and the right of the respondent, the registered proprietor, are extinguished.⁵⁴

[100] I agree with Mr Simon QC that section 2 of the *Real Property Limitation Act* must be read with section 10 of that Act and section XXXIV of the 1833 UK Act. In my judgment, the legal principles which emerge from so reading section 2 are fully captured in the following statement of the learned authors of *Cheshire and Burn's Modern Law of Real Property*:⁵⁵

The effect of a person remaining in possession of the land of another for a period of time fixed by law varies in different countries and in different ages. Thus, the effect of *usucapio* in Roman law was to confer a positive title to the land upon a person who had remained in possession for a certain time. Under the Statutes of Limitation which were in force in England prior to 1833 the effect of remaining in possession for the prescribed period was to bar only the remedy of the true owner, not his right. His title remained intact, and if he came lawfully into possession again, his title might prevail against the possessor (Lightwood, *Possession of Land*, p 153).

Under the statutes which have been in force since 1833; Real Property Limitation Act 1833; Real Property Act 1874; Limitation Act 1939) the effect of remaining in possession for the statutory period of twelve years is still merely negative, but now in the sense that the right as well as the remedy of the true owner is extinguished. The *usucapio* of Roman Law exemplified what is sometimes called acquisitive prescription in the sense that possession of another's land for a period conferred a positive title upon the occupier, or squatter as he is familiarly described, but English law has never adopted this theory in its treatment of corporeal hereditaments and chattels, though it has done so in the case of easements and profits.

And at 1149:

⁵⁴ *Incorporated Society v Richards*, 1 Dru. & War. 289; see *Doe v. Sumner*, 14 M. & W. 39; ante, p. 86

⁵⁵ E. H Burn, John Cartwright, G. C Cheshire, *Cheshire and Burn's Modern Law of Real Property*, 18th Edn. Oxford: Oxford University Press, 2006 at pp. 1127-1128

When time has run against a claimant, the effect in every case, no matter whether his claim is founded on tort, breach of contract, dispossession of land or some other wrong, is to bar his remedy. As a general rule, however, the right is not barred. He is precluded by the extinction of the remedy from a resort to legal proceedings, but he is free to enforce his still-existent right by any other method that may be available. Before 1833 this was the effect of adverse possession of land for the required period, but the Real Property Limitation Act of that year provided that at the end of the statutory period the right, as well as the remedy, of the dispossessed owner should be extinguished.

[101] That is the law on the effect of adverse possession pursuant to *section 2, section 10* of the *Real Property Limitation Act* and section XXXIV of the UK 1833 Act read together. Twelve years of adverse possession extinguishes the remedy and right of the dispossessed owner.

[102] In the instant case, the Court of Appeal considered the law established by those provisions in light of the *Title by Registration Act*. The Court held that, those provisions, read in that context, did not lead to “automatic extinguishment” of the rights of the true owner. Delivering the judgment of the Court of Appeal, Baptiste JA reasoned at para [44]:

Further, the consequences of Ms Dyer-Munroe’s attempt to limit the inquiry to sections 2 and 10 of the Real Property Limitation Act would be automatic extinguishment of the right and title of the registered proprietor after the expiry of the limitation period. Such a result would not be in sync with the tenor of the Title by Registration Act. In light of section 33, it would be impracticable to contend in favour of automatic extinguishment of title of the registered proprietor as this would render the section sterile and nugatory. In my judgment, automatic extinguishment of title would also jeopardise one of the basal purposes of the Title by Registration Act, which is to provide certainty of title to land. In the circumstances of this case, it would mean that though the respondent’s title is indefeasible his right and title would be extinguished at the end of the limitation period, without the procedure for acquiring prescriptive title under section 33 having been employed. That situation would be both untenable and illogical.

[103] I agree with Baptiste JA that there is a profound conceptual tension between extinguishment of the remedy and the right of the registered proprietor by an

adverse possessor pursuant to *sections 2 and 10* of the *Real Property Limitation Act* and the indefeasibility of the certificate of title of the registered proprietor pursuant to the *Title by Registration Act*. As I see it, this tension is inevitable given the fact that the foundational principles on which the *Real Property Limitation Act* rests is a system of land law based on possession and relativity of title and thus a system which eschews absolute and indefeasible ownership of land. Per contra, the *Title by Registration Act* is firmly based on principles of absolute and indefeasible title to land.

[104] That said, I do not agree with the Court of Appeal that the *Title by Registration Act* forecloses on extinguishment pursuant to *sections 2 and 10* of the *Real Property Limitation Act*. That this is not so is evident from *section 33* of the *Title by Registration Act*. That section expressly makes provision for “[w]here any person has acquired, or claims to have acquired, under the *Real Property Limitation Act*, the ownership of land”. In my view, that provision is an unmistakable statutory indication that ownership by adverse possession is continued in the title-by-registration system in the Commonwealth of Dominica. Indeed, I can find no interpretational pathway to the view expressed by the Court of Appeal that the *Title by Registration Act* somehow altered the meaning of extinguishment under the *Real Property Limitation Act*. In my opinion, subject to what I explain in this judgment below, notwithstanding the *Title by Registration Act*, the legal effect of adverse possession vis-a-vis the registered proprietor is to extinguish the right and remedy of the registered proprietor against the adverse possessor.

[105] In consequence, I agree with Mr Simon QC that the legal effect of the appellant’s admitted adverse possession was the extinguishment of the right and remedy of the respondent. The real question, however, is what does this mean?

[106] It is generally accepted that, in legal theory, the legal effect of extinguishment is intimately bound up with the associated principles of possession and relativity. Thus, the legal effect of extinguishment is restricted to the extinguishment of the

remedy and right of the dispossessed owner as against the adverse possessor. So that, all that the adverse possessor acquires by extinguishment is immunity from interference by the dispossessed. In practical terms, he gets a defence to any action for possession by the dispossessed owner. But, very importantly, he does not acquire the title of the dispossessed owner. The learned authors of *Cheshire and Burn's Modern Law of Real Property* make this very clear. They quipped:⁵⁶

[T]he 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'... There is no transfer, statutory or otherwise, to the squatter of the very title held by the dispossessed person.

[107] This view of the position of the adverse possessor finds firm support in the statement of Lord Radcliffe in the English House of Lords case of *Fairweather v St. Marylebone Property Co. Ltd.*⁵⁷ that:

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 exhausts the one or more periods allowed by statute for successful intervention. His title, therefore, is never derived through but arises in spite of the dispossessed owner.

[108] The upshot of the foregoing in this case is that even though the appellant's adverse possession pursuant to the *Real Property Limitation Act* operated to extinguish the right and remedy of the respondent registered owner, that extinguishment *per se* could not have in legal theory, and did not in practice, transfer to the appellant the title held by the respondent. As will be explored later in this judgment, in the title-by-registration system in the Commonwealth of Dominica such a transfer could only have been effectuated under *section 33* of the *Title by Registration Act*.

⁵⁶ E. H Burn, John Cartwright, G. C Cheshire, *Cheshire and Burn's Modern Law of Real Property*, 18th Edn. Oxford: Oxford University Press, 2006 at p 1150

⁵⁷ [1963] AC 510; [1962] UKHL 1; [1962] 2 All ER 288

[109] The dicta of Archer P in the British Caribbean Court of Appeal case of *George v Rosalie Estates Ltd*⁵⁸ may be cited in support of the foregoing principles. In that case, a question arose as to whether the extinguishment of the registered title of a company by an adverse possessor transferred the company's title to the adverse possessor. Archer P stated the law to be that:⁵⁹

Even assuming...that the company's title was extinguished...the result would not have been to transfer the company's rights to the appellant or his predecessors. This would have been the case if the land in question had been brought under the Title by Registration Ordinance, Cap 222...

[110] The law is palpably clear, then, that the appellant in this case cannot claim to have acquired the title of the respondent as a result of extinguishment pursuant to the *Real Property Limitation Act*. As I see it, it becomes necessary now, therefore, to explore the question: What, in principle, is the legal effect of the appellant's adverse possession on the respondent's certificate of title acquired by him under the *Title by Registration Act*?

The legal effect of the appellant's adverse possession on the respondent's certificate of title under the Title by Registration Act

[111] The enactment of the *Title by Registration Act* was undoubtedly inspired by the Torrens system introduced into Australia in 1858 which spread into many Commonwealth countries including the Commonwealth of Dominica. The declared objective of that system is to achieve complete certainty by absolute and indefeasible titles of property registered under the relevant Act. Notwithstanding the multitude of precedents to be found throughout the Commonwealth interpreting statutes based on the Torrens system, I accept the statement of Sir Frank Kitto, in delivering the advice of the Board of the Privy Council in *Shillingford v AG for Dominica*,⁶⁰ that the Dominican Act "must be interpreted according to its own terms". That interpretational principle is echoed in the earlier Privy Council decision of *James Clinton Chisholm v James Hall*,⁶¹ where Lord

⁵⁸ (1969) 13 WIR 401

⁵⁹ *ibid* at p 408

⁶⁰ (1970) 14 WIR 57 at 70

⁶¹ (1959) 1 WIR 413 at 417

Jenkins approached the question before the Board as turning simply and solely upon the true interpretation of the Jamaican Registration of Titles Law itself. And, in the more recent Privy Council decision in *Richardson Anthony Arthur v AG for Turks and Caicos*,⁶² Sir Terrence Etherton reaffirmed that:

[15] It is necessary...when considering the effect of legislation implementing the Torrens system in any jurisdiction, to focus on the provisions of the particular legislation in question, and to take special care when considering the relevance and usefulness of judgments in cases in other jurisdictions where the legislation, policy considerations and general principles of law may be different.

[112] In my judgment, when the *Title by Registration Act* of the Commonwealth of Dominica is “interpreted according to its own terms”,⁶³ there can be no mistaking that the legislative intent was to retain the traditional doctrine of adverse possession as an exception to indefeasibility in the title-by-registration system in the Commonwealth of Dominica. In this regard, *sections 8, 10 and 33* of the Act and the *First Schedule* to the Act are of especial importance.

[113] As seen above, *section 8* declares all certificates of title issued under that Act to be “indefeasible”. The *First Schedule* defines “indefeasible” as meaning that the certificate of title issued by the Registrar of Titles 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 set out in the certificate. *Section 10* declares that the rights of a registered proprietor named in a certificate of title to the land comprised in a certificate of title “shall be the fullest and most unqualified right which can be held in land by any subject of the State”.

[114] It is manifest from *sections 8 and 10* that the registered proprietor under the *Title by Registration Act* is in a kingpin position in respect of title to land. However, that position may be challenged by an adverse possessor if, according to the definition of “indefeasibility” in the *First Schedule*, “the title of the registered

⁶² [2012] UKPC 30 at paras [13] – [15]

⁶³ Per Sir Frank Kitto in *Shillingford v AG for Dominica* (1970) 14 WIR 57 at 70

proprietor had been superseded by a title acquired under the Real Property Limitation Act”. From this caveat in the definition of indefeasibility, supersession under the *Title by Registration Act* is a prerequisite to a challenge by an adverse possessor to the otherwise indefeasible title of the registered proprietor. Supersession is, as it were, the conceptual bridge by which the doctrine of adverse possession is linked with the title-by-registration system in the Commonwealth of Dominica and over which an adverse possessor must pass in order to challenge a certificate of title obtained under the *Title by Registration Act*.

[115] Section 33 of the *Title by Registration Act* lays down the procedure by which supersession is achieved. By the plain words of this section, supersession is only available to a person who has acquired, or claims to have acquired, ownership of land under the *Real Property Limitation Act*. It is open to such a person to present a request to the Registrar of Titles to have a certificate of title issued to him *in lieu* of the registered proprietor in the original certificate of title. When a request for such a certificate of title is presented to the Registrar of Titles, the Registrar must state a case to the court, and must not issue a certificate of title on the request until he has received the direction of the Court the case stated.

[116] That means that “extinguishment” pursuant to the *Real Property Limitation Act* is a *sine qua non* to qualifying for supersession under the *Title by Registration Act*. Thus, as was said in *George v Rosalie Estates Ltd*,⁶⁴ “extinguishment” in the title by registration system in the Commonwealth of Dominica confers on an adverse possessor an inchoate right which entitles him or her to register *under section 33* to have issued to him *in lieu* of the registered proprietor in the original certificate of title. Unless and until supersession, an adverse possessor like the appellant cannot defeat the indefeasible title of the respondent who is a registered proprietor.

The legal sanction for the appellant’s non-compliance with section 33

⁶⁴ (1969) 13 WIR 401

- [117] Counsel for the appellant contended that, even if failure to comply with *section 33* meant that the appellant could not defeat the respondent's indefeasible title, he, the appellant, could still use his possessory title acquired under the *Real Property Limitation Act* as a defence to the respondent's action for trespass. Counsel, in an admirably nuanced submission before us, submitted that the sanction for non-compliance with the requirements in *section 33* of the *Title by Registration Act* is legislated for in that section. Counsel conceded, it may be that according to that section, in order to supersede and so to defeat the title of the registered proprietor, the adverse possessor must present a request to the Registrar of Titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title. However, Counsel pointed out, that section expressly provides that, until the adverse possessor has obtained such a certificate of title, he or she "shall not be entitled to maintain any suit" in regard to the land in question. Counsel stressed that that is the sanction, and the only sanction, for non-compliance by a person claiming a possessory title under the *Real Property Limitation Act*.
- [118] It is upon that platform that Counsel has, with no small skill, crafted his major submission on the legal effect of non-compliance with *section 33*. Claiming to rely on *George v Rosalie Estates Ltd*⁶⁵ and *Burton Riviere v Judith Durand*,⁶⁶ Counsel posited that the expression "maintain any suit" in *section 33* is to be interpreted as meaning nothing more than that the adverse possessor cannot initiate or commence any suit against a registered proprietor on the basis of ownership pursuant to the *Real Property Limitation Act*. Or, put differently, ownership pursuant to the *Real Property Limitation Act* cannot be used as a sword. According to Counsel, the expression "maintain any suit" does not mean, however, that an adverse possessor like the appellant may not assert his ownership pursuant to the *Real Property Limitation Act* by way of defence, or as he put it, as a shield, in an action brought by a registered proprietor like the respondent. As the appellant in this case is merely asserting his possessory title

⁶⁵ (1969) 13 WIR 401

⁶⁶ DOMHCVAP 2006/013 (Unreported)(Court of Appeal of Dominica)

as a defence, Counsel concluded, there is no need for the appellant to show compliance with *section 33*.

[119] I do not find even a scintilla of persuasion in that argument, elaborate as it is. In my view, in the first place, the meaning of *section 33* proposed by Counsel rests on too linguistically strained a construction of the *Title by Registration Act*. As already noted, that Act is an Act which was enacted in 1886. It is universally accepted that, when construing such an old Act, it is particularly important to have regard to the purpose of the Act and less so to the literal meaning of the specific words used in the Act. The reason for such an approach was explained in *R (on the application of Andrews) v The Secretary of State for Environment and Rural Affairs*.⁶⁷ It was said there with reference to the interpretation of an 1801 Act:

30. We start by observing that the 1801 Act is not drafted with the degree of accuracy and consistency of language that is found in modern statutes. As Sales J said in *Edwards & Walkden (Norfolk) Ltd V City of London...* (a case about an 1860 Act...)

The 1860 Act is a Victorian statute enacted before the creation of the Office of the Parliamentary Counsel in 1869 (the office of dedicated statutory drafters now available in Government), which is not drafted with the precision and clarity which has come to be expected of statutory drafting since then.

...

32. As the judge said...it is possible to read the provisions of the 1801 Act several times and to see apparently different meanings on each reading...This is not a promising basis on which to mount a linguistic argument...

[120] The clear law, then, is that *section 33* must be understood within the overarching statutory purpose of the *Title by Registration Act* and not on the linguistic construction of that section. A quick foray into the history of the Act is useful in exposing the purpose of the Act.

⁶⁷ [2015] EWCA Civ 669; [2016] 3 All ER 1022

- [121] Dominica became an English colony in 1763 and English system of land law became the law in Dominica. Naturally, this system included the twin medieval concepts of possession and relativity of title which was the underlying theoretical basis for ultimately determining title. The problem was that, under that system of title, the transferee of the land acquired a dependent title. The transferee needed to be satisfied that he or she had a ‘good root of title’. Therefore, it was necessary to ensure that the person from whom title was acquired had a title that could stand up against any other claimant.
- [122] Sampson Owusu in his “Commonwealth Caribbean Land Law”⁶⁸ explains that English colonists in time found that that system was plagued by uncertainty of title and unreliability of transactions involving title in the newly acquired colony. Thus, the *Title by Registration Act* was enacted into law in the Commonwealth of Dominica for the purpose of introducing a system which would provide certainty of title and reliability of transactions pertaining to title. This was to be achieved by providing for indefeasible titles of property in the Commonwealth of Dominica by the registration of all titles to ownership of land.
- [123] As has been seen, according to the *First Schedule* to the Act, an indefeasible title “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”. In my judgment, given the purpose of the Act, the expression “challenged in a court of law” must mean to make any assertion in any lawsuit intended to dispute or challenge the title of the registered proprietor. To be sure, it comprehends the amplitude of possible challenges in court. It therefore covers challenges in a suit brought against the registered proprietor as well as challenges by way of defence in a suit commenced by the registered proprietor. That is the logic of the title by registration system introduced into the Commonwealth of Dominica by the *Title by Registration Act*.
- [124] Interpreted with this purpose in mind, the stipulation in *section 33* that an adverse

⁶⁸ Sampson Owusu, *Commonwealth Caribbean Land Law*, (Routledge-Cavendish, 2007)

possessor “shall not be entitled to maintain any suit” disentitles any such person from asserting in any suit by or against a registered proprietor a title acquired under the *Real Property Limitation Act* where he or she has not registered that title under *section 33* as a challenge to the title of the registered proprietor. *Ex hypothesi*, an adverse possessor who has not complied with *section 33* is equally disentitled from initiating a suit asserting a *Real Property Limitation Act* title as well as from asserting such title by way of defence in a suit which has been brought against him by the registered proprietor.

[125] I do not agree with the submission of Counsel for the appellant for a second reason. It is that the cases of *George v Rosalie Estates Ltd*⁶⁹ and *Burton Riviere v Judith Durand*,⁷⁰ so heavily relied on by him, do not afford even a hint of support for a conclusion that the expression “shall not be entitled to maintain any suit” in *section 33* means that an adverse possessor shall not commence or institute a suit to challenge the title of a registered proprietor but may use adverse possession as a defence to a suit instituted by a registered proprietor based on his indefeasible title.

[126] In *George v Rosalie Estates Ltd*,⁷¹ the appellant, an adverse possessor, issued a writ against the respondent, a registered proprietor, when the appellant had not yet been issued a certificate of title pursuant to *section 33*. It was argued by the appellant that the words “maintain a suit” in *section 33* should be interpreted to mean continue a suit and not commence or initiate a suit so that a person in the position of the appellant could bring an action of trespass without having complied with *section 33*. The British Caribbean Court of Appeal rejected that argument. It refused to interpret the word “maintain” to mean continue. Instead, that court interpreted that word in the purposive context of the *Title by Registration Act* and held that the word meant that the appellant could not commence or institute proceedings until he had complied with *section 33*.

⁶⁹ (1969) 13 WIR 401

⁷⁰ DOMHCVAP 2006/013 (Unreported)(Court of Appeal of Dominica)

⁷¹ (1969) 13 WIR 401

- [127] The ratio of the decision in *Burton Riviere v Judith Durand*⁷² is difficult to divine. However, what is very clear is that the Court of Appeal in that case interpreted the words “shall not be entitled to maintain a suit” in section 33 in accordance with *George v Rosalie Estates Ltd*⁷³ as including a proscription against an adverse possessor instituting proceedings against a registered proprietor.
- [128] Plainly, then, the only question raised in the cases of *George v Rosalie Estates Ltd*⁷⁴ and *Burton Riviere v Judith Durand*,⁷⁵ was whether a person who had acquired ownership under the *Real Property Limitation Act* but who had not been issued with a certificate of title pursuant to *section 33* could institute proceedings for trespass against the registered proprietor. That was the question answered in those cases. To be sure, no question was raised, nor any opinion given, in either of these cases as to whether such an adverse possessor could use adverse possession as a defence. The cases may not therefore be cited as supporting a conclusion that, as Counsel appears to be suggesting, “maintain” in section 33 means that adverse possession may be invoked as a defence in this case.
- [129] The third and final reason why I do not agree with Counsel for the appellant’s interpretation of *section 33* is that interpretation would lead to an unreasonable and inconvenient result. It would mean that even though the *Title by Registration Act* was enacted for the express purpose of achieving certainty in land title by declaring a certificate of title indefeasible, the Act would be treated as keeping the unregistered adverse possessory title lurking in the shadow to undermine the very certainty which the certificate of title of the registered owner is intended to secure. Plainly, such a result would defeat the obvious intention of Parliament in enacting that Act.

⁷² DOMHCVAP 2006/013 (Unreported)(Court of Appeal of Dominica)

⁷³ (1969) 13 WIR 401

⁷⁴ (1969) 13 WIR 401

⁷⁵ DOMHCVAP 2006/013 (Unreported)(Court of Appeal of Dominica)

- [130] In the English Court of Appeal of *Artemiou v Procoplu*,⁷⁶ Danckwerts LJ stated: “An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available”. This same principle of interpretation was adumbrated by Lord Reid in the English House of Lords case of *Luke v IRC*.⁷⁷ There, Lord Reid stated that, where to apply words literally would “defeat the obvious intention of the legislation and produce a wholly unreasonable result” the court must “do some violence to the words” in order to achieve that obvious intention and produce a rational construction.
- [131] The principle of interpretation stated in these cases is a time-honoured common law principle. As I see it, this principle must be deployed in this case, if necessary, to avoid the unreasonable result threatened by Mr Simon QC’s interpretation of *section 33 of the Title by Registration Act*.
- [132] The principle must also be deployed to avoid a potentially mischievous doctrinal problem relating to *stare decisis* for the OECS Court of Appeal with the Privy Council’s interpretation of *section 34 of the Title by Registration Act* of Antigua and Barbuda. That section is *in pari materia* with *section 33*. In *Graham-Davis v Charles*, Lord Jauncey in delivering the judgment of the Board of the Privy Council held 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 there was compliance with *section 34 of the Title by Registration Act* of Antigua and Barbuda. This problem has been fully explored by my brother Anderson JCCJ at paragraphs [71] to [73] of this judgment. I am in entire agreement with the opinions expressed there by him.
- [133] For all of the foregoing reasons, it is my judgment that, in the end, the courts below in this case were correct in holding that the appellant’s non-compliance with *section 33* meant that he could not rely on a title acquired under the *Real Property Limitation Act* as a defence to the respondent’s assertion of his

⁷⁶ [1966] 878 at 888

⁷⁷ [1963] AC 557 at 557

indefeasible title. Accordingly, I would dismiss the appeal and order costs for the respondent.

Disposal

[134] The Appeal is allowed. The orders of the courts below are set aside. The parties have agreed that there shall be no order as to costs.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Justice W Anderson

/s/ M Rajnauth-Lee

The Hon. Mme Justice Rajnauth-Lee

/s/ A Burgess

The Hon Mr Justice Burgess