JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA (AG)

APPLICATION NO COA2022APP00059

BETWEEN	**BENBECULA LIMITED**	**1ST APPLICANT**
AND	**MALCOLM MCDONALD**	**2ND APPLICANT**
AND	**PALM BEACH RUNAWAY BAY LIMITED**	**RESPONDENT**

Mrs Denise Kitson QC, Malcolm McDonald and Ms Regina Wong instructed by Grant, Stewart, Phillips & Co for the applicants

B St Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the respondent

6 April 2022 and 6 May 2022

F WILLIAMS JA

[1] I have read in draft the judgment of my brother D Fraser JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

D FRASER JA

[2] This is an application filed on 15 March 2022 by the applicants, Benbecula Limited and Malcolm McDonald, for permission to appeal against the decision of Batts J ('the learned judge'), delivered on 1 March 2022, in a written judgment cited as **Palm Beach Runaway Bay Limited v Benbecula Limited and Malcolm McDonald** [2022] JMCC Comm 5. Batts J ordered that:

"a. It is declared that the [respondent] is entitled to a right of way over the roadway marked 'Road Reserved 26 feet wide' as shown on the plan annexed to Certificate of Title registered at Volume 1505 Folio 947 of the Register Book of Titles (the Reserved Road)

b. A Case Management Conference for the assessment of damages and the consideration of other remedies is to be fixed and

c. Costs to the [respondent] to be agreed or taxed."

[3] The applicants also seek a stay of execution of the order at paragraph b and such further or other relief as may be just in the circumstances.

[4] The grounds on which the application was made are as follows:

"1. Rule 1.8 of the Court of Appeal Rules provides that an application for permission to appeal must be made within fourteen (14) days of the order against which permission to appeal is sought.

2. The orders against which permission to appeal is being sought were made on March 1, 2022.

3. The applicants' oral application to the court below for permission to appeal was refused.

4. The applicants have a realistic prospect of succeeding on the appeal and the appeal would be rendered nugatory in the absence of a stay of execution.

5. The grounds of appeal on which the applicants intend to rely on [sic] are, inter alia, that his Lordship:

a. erred in granting Summary Judgment to the [respondent];

b. erred in his finding in law that a right of way is not an interest in land or right capable of being extinguished by operation of section 3 of the Limitation of Actions Act."

[5] The 2nd applicant filed an affidavit in support of the application, exhibiting the evidence that was before the learned judge. The respondent, Palm Beach Runaway Bay Limited, opposed the application. Before going into the substance of the application it is necessary to set out the background.

Background

[6] On 29 December 2020 the respondent filed a claim in the Commercial Division of the Supreme Court against the applicants, claiming an entitlement to enforce a right of way over a roadway marked "Road Reserved 26 feet wide" ('the reserved road'), as depicted on a plan annexed to certificate of title registered at Volume 1505 Folio 947 of the Register Book of Titles. The claim in full sought the following:

> "1. A declaration that the [respondent] is entitled to a right of way over the roadway marked 'Road Reserved 26 feet wide' as shown on the plan annexed to certificate of title registered at Volume 1505 Folio 947 of the Register Book of Titles ('the Reserved Road').
>
> 2. A declaration that the [respondent] is entitled to use and access the reserved road unimpeded and uninterrupted.
>
> 3. An injunction restraining the [applicants], themselves or their servants or agents or otherwise howsoever, from restricting, obstructing or interfering in any way with the [respondent's] right of way over the Reserved Road.
>
> 4. An order compelling the [applicants] to remove the wall, the gate and the outbuildings, including a generator house, dog kennels and a gate house they constructed on or blocking the Reserved Road, and permitting the [respondent] to remove them if the [applicants] fail to do so.
>
> 5. Damages for the [applicants'] obstruction and interference with the [respondent's] right of way over the Reserved Road.
>
> 6. Interest on damages pursuant to the Law reform (Miscellaneous Provisions) Act.
>
> 7. Costs.

8. Such further or other relief as the court may consider appropriate."

[7] On 16 February 2021 the applicants filed a defence to the claim asserting that the right of way had long been extinguished as they had been in exclusive and undisturbed occupation since or around 1996. They also averred that the said right of way had been abandoned or not exercised since its creation in or around 1950.

[8] On 6 October 2021 the respondent filed an application for summary judgment on the claim. The orders sought were that:

"a. The [respondent] be granted summary judgment against the [applicants] on the claim herein.

b. Alternatively, the [respondent] be granted summary judgment on the issue as to whether the right of way over the reserved road has been extinguished by virtue of the [1st applicant's] alleged exclusive occupation of the reserved road.

c. A hearing date be set for an assessment of damages.

d. The costs of these proceedings be awarded to the [respondent].

e. There be such further or other relief as the court deems just."

[9] At the hearing of the application for summary judgment, evidence was put before the learned judge in the form of affidavits sworn to by Frederick Moe and Grantley Fitzgerald Kindness (both filed 6 October 2021) and by the 2nd applicant, Wentworth Prendergast and Seuin Pirson (all three filed 18 January 2022). The relevant facts as found by the learned judge from that evidence are as follows:

a) the 1st applicant is the registered owner of lot 8, which is registered at Volume 1267 Folio 64 of the Register Book of Titles and adjoins the respondent's land. (It is noted that the learned judge indicated that "The plan annexed to the title shows a roadway marked 'reserved road 26 feet wide' [The reserved road]". However, from the affidavit evidence of Mr Grantley Fitzgerald Kindness,

Commissioned Land Surveyor, that plan was annexed to the title of the respondent registered at Volume 1505 Folio 947 of the Register Book of Titles. While the error is made in the outline of the facts, the correct indication of the annexure of the plan is outlined in the first order made by the learned judge at the end of his judgment. Nothing turns on the error, as there is no dispute concerning the identification of the reserved road or the physical outlay of the parties' properties.)

b) the 2nd applicant is a director, and the general manager of the 1st applicant, who at all material times acted as its agent.

c) the respondent is the registered owner of lots 2, 3, 4, 5, 6, 7, 13, 14 and the canal located between lots 4 and 5 and lots 7 and 8, all comprised in the certificate of title registered at Volume 1505 Folio 947 of the Register Book of Titles.

d) the reserved road is adjacent to the 1st applicant's land and to the respondent's land. It allows for an alternate access to the respondent's and the 1st applicant's land.

e) There is agreement on the physical outlay of the parties' properties as outlined in paragraphs 3 – 5 of the affidavit of Frederick Moe, a director of the respondent.

f) The applicants constructed a fence and a gate in 1996 across the reserved road. The fence was later replaced by a wall. The applicants maintain that since 1996 they enjoyed exclusive occupation, use of and access to the reserved road, which, they contend, extinguished any right of way to the use of the reserved road by any other proprietor. They allege that there was no protest until long after the 12-year limitation period had passed.

g) The applicants' position is supported by Wentworth Prendergast and Gavin Pirson who both confirm the presence of the fence and wall across the reserved road for a period exceeding 12 years and the applicants' exclusive possession.

h) The respondent alleges that the applicants also erected a generator house, dog kennels and a gate house on the reserved road.

i) By letter dated 13 November 2020 the Saint Ann Municipal Corporation requested the 2nd applicant to remove the gate and wall obstructing the reserved road.

j) The opinion provided in his affidavit by Grantley Fitzgerald Kindness after his review of the relevant titles, plans and easement was that:

> "a. The Reserved Road is still part of the land registered at Volume 698 Folio 45; and
>
> b. Both Palm Beach and Benbecula are entitled to a right of way over the Reserved Road and to use that roadway to access their respective properties."

k) Despite the evidence of Grantley Fitzgerald Kindness, the applicants maintain that the right of way has been extinguished.

[10] It should also be noted that the Saint Ann Municipal Corporation indicated in letters to the 2nd applicant (dated 13 November 2020) and the respondent (dated 7 July 2021), that access should be granted by the applicants to the reserved road. In the letter to the respondent, it was stated that in the building and planning approval granted in 2019, it was indicated that the reserved road would serve as an alternate access point, particularly for emergency purposes. The approval was for a development being undertakn by the respondent on its property.

[11] Regarding the facts, before this court, the position remains that as noted by the learned judge at paragraph [1] of his judgment, that, "although rather involved they are not much in dispute".

The submissions

Counsel for the applicants

[12] Learned Queen's Counsel, Mrs Kitson, commenced by submitting that the need for permission to appeal, arose under section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). She argued that, in the circumstances of this case, where none of the exceptions listed in the section are applicable, the issue was whether the order made by Batts J was interlocutory in nature. Having regard to dicta in the case of **Ronham & Associates Ltd v Christopher Gayle & Anor** [2010] JMCA App 17, she advanced that the order made by Batts J was interlocutory as if he had ruled against the application for summary judgment, the action would have proceeded. Therefore, even though his ruling disposed of the matter, it was interlocutory in nature.

[13] Queen's Counsel further advanced that the applicants are in compliance with rule 1.8(2) of the Court of Appeal Rules ('CAR') by applying to this court for leave to appeal, as an unsuccessful oral application for leave to appeal had been made by the applicants on 1 March 2022, after the judgment was delivered by the learned judge. Queen's Counsel also submitted that the application, having been filed on 15 March 2022, was within time and in compliance with rule 1.8(1) of the CAR. Pursuant to rule 1.8(9) of the CAR, considered in the case of **Evanscourt Estate Company Ltd v National Commercial Bank** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, Application No 166/2007, judgment delivered 26 September 2008, Queen's Counsel acknowledged that for leave to be obtained, the applicants would have to show that they have a real as opposed to a fanciful chance of success on appeal.

[14] Queen's Counsel argued that the applicants have a real chance of success, as on a careful review of the Jamaican Limitation of Actions Act ('LAA'), the English 1833 Real

Property Limitations Act from which it was copied and cases interpreting the English act, the findings of law upon which the learned judge had premised the grant of summary judgment are erroneous. In particular, Queen's Counsel maintained that the finding of the learned judge that the phrase in section 3 of the LAA "No person shall make an entry" is qualified by "to recover any land or rent" is incorrect.

[15] Instead, Queen's Counsel contended that on a review of sections 3, 21 and 30 of the LAA, the correct interpretation was that entry onto land should be considered separately and apart from an action or suit to recover any land or rent. She continued by advancing that a right of way is a right over land and the exercise of such a right would require an entry on such land. That right, she argued, may be extinguished by adverse possession of the area of land over which the right of way is asserted, thus extinguishing the right of way. She maintained that the issue as to whether this had occurred is triable and had to be determined based on evidence. Queen's Counsel cited Halsbury's Laws of England/Real Property and Registration (Volume 87 (2017) Chapter 1, paragraph 63) in support of her submission that an easement is an interest in land.

[16] She added that the learned judge had failed to appreciate the significance and applicability of the authorities relied on by the applicants, namely **Littledale v Liverpool College** [1898] 1 CH 19 and **Amritharaja and another v White and another** [2021] EWHC Ch 330 upheld on appeal at [2022] EWCA Civ 11, in that, although the courts found that the facts of each case did not meet the threshold required by the parties claiming adverse possession over the right of way, that is, that they had the necessary *animus possidendi*, they supported her submission that adverse possession of a right of way is in fact contemplated by the legislation and capable of being asserted in law.

[17] Queen's Counsel further submitted that, although the learned judge placed heavy reliance on *obiter dicta* in the case of **Icebird Limited v Alicia P Winegardner** [2009] UKPC 24 to come to his decision, one important distinction in that case was that the dominant and servient tenement lands, in relation to the easement, were owned by the respective parties, with the right of way to be exercised over the respondent's land. Most

important in her estimation, was the fact that their Lordships determined that there were triable issues which would not be prejudiced by the delay and therefore the action should not be struck out.

[18] Queen's Counsel also advanced that the *obiter dicta* in **Icebird**, when juxtaposed against the extensive analysis of the relevant issue done by their Lordships in the authorities relied on by the applicants, ought not to have resulted in the application being determined in the manner that it was by the learned judge.

[19] In respect of the application for the stay of proceedings, Queen's Counsel acknowledged that, in considering whether to exercise its discretion to grant a stay, the court should have regard to the applicant's prospect of success in the pending appeal, the real risk of injustice to one or both parties recovering or enforcing the judgment at the end of the appeal and the fact that the court had no power to stay a purely declaratory order.

[20] Queen's Counsel submitted that, whilst the first order of the learned judge was declaratory, he also went on to order a case management conference for assessment of damages and other relief which were susceptible to being stayed. Queen's Counsel also argued that the applicants had proven that they had a real prospect of success on the appeal and therefore a stay of execution of the judgment, including the case management conference for setting an assessment of damages and the consideration of other remedies, would be necessary to prevent ruin and injustice to the applicants if the appeal is successful. This is a context where orders made at the case management conference could include the demolition of the wall, gates and other structures built on the disputed right of way which would render the appeal nugatory should the appeal be successful.

[21] She added that there is greater risk of injustice to the applicants than to the respondent, as if the appeal is successful the applicants would suffer the losses outlined above, while if the appeal is unsuccessful the remedies would still be available to the respondent. She also advanced that, in that event, any loss to the respondent would be

quantifiable in damages as there had been no significant disruption to the activities of the respondent in completing its development.

[22] She submitted that the circumstances in this matter are fitting for the court to grant a stay of the orders. Queen's Counsel relied on the authorities of **Crown Motors Limited et al v First Trade International Bank and Trust Limited** (in liquidation) [2016] JMCA Civ 6 and **Dennis Atkinson v Development Bank of Jamaica Limited** [2015] JMCA App 40 in support of the application for a stay.

Counsel for the respondent

[23] Learned Queen's Counsel Mr B St Michael Hylton submitted that the application for permission to appeal should be refused as the appeal does not have a realistic prospect of success. He relied on dicta from Morrison JA (as he then was) in the case of **Duke St John Paul Foote v University of Technology Jamaica and another** [2015] JMCA App 27A at paragraphs [20] and [21].

[24] Queen's Counsel argued that the two contentions advanced by the applicants to resist the respondent's application for summary judgment namely that:

a) they have had exclusive possession of the reserved road for more than 12 years and have acquired by adverse possession the respondent's right of way over the reserved road; and

b) that the respondent has abandoned the right of way, are not supported by the law or the facts.

[25] Queen's Counsel pointed out that the evidence established that the original owner of the parcel of land, which then included the property of the applicants and the respondent, "and his successors in title" were? granted "…full and free right to use the Road Reserved 40 feet wide…". He further advanced that the right of way or easement was endorsed on the title for the respondent's property in accordance with section 93 of the Registration of Titles Act ('RTA') in the following terms, "…TOGETHER WITH such

right of way as is possessed by the registered proprietor of the lands comprised in Certificate of Title registered at Volume 534 Folio 17 over the roadway marked Road Reserved 26 Feet wide". Accordingly, he submitted there is no dispute that the respondent has a right of way over the reserved road. It should be noted however that, while the endorsement on the title of the original owner of the parcel of land which included the property of the applicants and the respondent reflected the width of the reserved road as 40 feet, the endorsement of the width of the reserved road on the title of the respondent was 26 feet.

[26] Queen's Counsel maintained that an easement is a right over a parcel of land (servient tenement) which may be exercised by the owner of an adjoining parcel of land (dominant tenement). Further, that the previous owners expressly granted the registered proprietors of the respondent's property (and their successors) the right of way over the reserved road that is part of land registered at Volume 698 Folio 45, which is separate from the respondent's and the applicants' properties, and which is not owned by either party.

[27] Thus Queen's Counsel submitted, even if the applicants had a claim to adverse possession of the property containing the reserved road, they would own that land subject to the express right of way over the reserved road.

[28] Queen's Counsel also contended that section 3 of the LAA does not impose a limitation period against the right to enforce an easement and further that the definition of "land" in section 2 of the LAA to which section 3 applies does not apply to easements: see **Icebird Limited v Alicia P Winegardner** which addressed a materially similar provision.

[29] Queen's Counsel additionally relied on the proviso to section 70 of the RTA which he submitted had the effect that any title acquired by the applicants through adverse possession would be subject to the existing easement that burdens the title and could not extinguish the easement.

[30] Queen's Counsel also stated that he agreed with the formulation from Halsbury's cited by counsel for the applicants that an easement is an interest in land. He, however, argued that the learned judge opined that an easement was not an "interest in possession" in land, which was not a point addressed by the extract from Halsbury's.

[31] Queen's Counsel also sought to distinguish the authorities of **Amritharaja and another v White and another** and **Littlesdale v Liverpool** relied on by counsel for the applicants. Those arguments will be addressed during the discussion and analysis.

[32] On the issue of abandonment, Queen's Counsel submitted that it was clear on the evidence before the court that no intention of the respondent to abandon the right of way had been established, hence that could not be a basis for the appeal to succeed. He relied on Commonwealth Caribbean Property Law at page 212 and **Icebird Limited v Alicia P Winegardner** at paragraph 24. He observed, however, that it appeared the application was limited to the issue concerning whether adverse possession could extinguish the easement in these circumstances, as the finding of fact by the learned judge on the abandonment issue was unassailable, and it was not just a matter of whether or not the challenge on the issue of abandonment was pleaded.

[33] On the question of the stay, Queen's Counsel advanced that if the submissions on behalf of the respondent were accepted no question of a stay arises. In any event, Queen's Counsel submitted the stay should be refused as there are no substantive buildings on the property. The order of the court does not prevent the applicants from using the reserved road; it prevents applicants from excluding the respondent. Queen's Counsel also submitted that the balance of convenience favoured the stay being refused as the development approved for the respondent from 2019 could not proceed as the municipal corporation indicated they could not proceed unless they had access to the reserved road. Queen's Counsel, therefore, invited the court to refuse the application brought by the applicants and award costs to the respondent.

<u>Counsel for the applicants in reply</u>

[34] In reply, Mrs Kitson indicated that she disagreed with the interpretation of the proviso to section 70 of the RTA put forward by Mr Hylton. She submitted that once land is adversely possessed, both the previous title and any easement attached to it as an interest in land would also be extinguished.

[35] Mrs Kitson also noted that, whilst the submissions on behalf of the applicant did not address the issue of abandonment, the findings of law and fact challenged in the draft notice of appeal filed by the applicants, included a challenge to paragraph [17] of the judgment of the learned judge in which the issue of abandonment was addressed.

Discussion and analysis

[36] It is common ground that under section 11(1)(f) of the JAJA, under which this application falls, it is interlocutory in nature as explained in the case of **Ronham & Associates Ltd v Christopher Gayle & Anor**. It is also not in dispute that the applicants are in compliance with paragraphs (2) and (1) of rule 1.8 of the CAR. The remaining central consideration under rule 1.8(9) of the CAR, on which this application turns, is whether the proposed appeal of the applicants has a real, that is a realistic not a fanciful chance of success: see **Evanscourt Estate Company Ltd v National Commercial Bank** and **Duke St John Paul Foote v University of Technology Jamaica and another**.

[37] In determining that solitary consideration, two issues have arisen from the submissions, namely:

a) Assuming the applicants have obtained or are entitled to obtain title to the reserved road through adverse possession, can that adverse possession extinguish the easement or right of way granted to the respondent over the reserved road?

b) Is there any reasonable basis on which the finding of the learned judge that there was insufficient evidence that the respondent

displayed any intention to abandon the easement may be challenged?

[38] I will address each in turn.

Issue a

[39] As noted in the court below and earlier in this judgment, the material facts are not in dispute and, in main, do not need to be further rehearsed at this point. It will, however, be useful to spotlight a few points from the agreed facts, the significance of which will be highlighted later. Those facts are:

a) both the 1st applicant's and the respondent's properties were originally part of a larger parcel of land whose owner and successors in title were granted "…full and free right to use the [r]eserved [r]oad….";

b) the right of way over the reserved road is endorsed on the title of the respondent;

c) the reserved road is adjacent to both the 1st applicant's property and to the respondent's property. It allows for alternate access to their respective properties;

d) the reserved road is part of land registered at Volume 698 Folio 45 of the Register Book of Titles, which is a title owned by a third party; and

e) the applicants have for a long time, (claimed to be 26 years by the applicants), fenced/walled off and gated the reserved road for their sole use.

[40] Central to the determination of the issue is the nature of an easement and the rules that have developed governing their exercise, existence and extinguishment. As

noted at page 834 of the Law of Real Property 5th Edition by Sir Robert Megarry and HWR Wade, an easement is a right that developed at common law by which one land owner could acquire a right over the land of another such as a right of way. At page 835 the learned authors note that one of the essentials of an easement is that there must be a dominant tenement which gains a right over a servient tenement in respect of which the easement is granted. It should also be highlighted that if the dominant and servient tenements come into the ownership and possession of the same person, any easement is extinguished: see **Buckby v Coles** (1814) 5 Taunt. 311. This latter rule recognises that as stated at page 837 of the Law of Real Property 5th Edition, "a man cannot have rights against himself".

[41] The contention of the applicants, that adverse possession can extinguish an easement or right of way, is based on the interpretation of certain sections of the LAA advanced by counsel for the applicants. All the relevant sections will be set out below. Section 2 of the LAA provides:

> "'land' shall extend to messuages and all other **corporeal** hereditaments whatsoever, and also to any share, estate or interest in them, or any of them, whether the same shall be a freehold or chattel interest;" (Emphasis supplied)

[42] Section 3 of the LAA sets the limitation period within which certain actions must be taken to be enforceable. It states:

> **"No person shall make an entry, 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 such entry, or to bring such action or suit, or shall have first accrued to some person through whom, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same." (Emphasis supplied)

[43] Section 21 of the LAA further provides:

> "When the right of any person **to make an entry, or bring an action to recover any land or rent** to which he may have been entitled for an estate or an interest in possession, shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or the same land or rent, no entry, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or gift which shall have been limited or taken effect after or in defeasance of such estate or interest in possession." (Emphasis supplied)

[44] Then at section 30 of the LAA it states:

> "At the determination of the period limited by this Part to any person **for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof** such entry, action or suit respectively might have been made or brought within such period, shall be extinguished." (Emphasis supplied)

[45] The centrepiece of the submissions made on behalf of the applicants is that the uses of the word "or" in sections 3, 21 and 30 of the LAA, mean that entry onto land should be considered separately and apart from an action or suit to recover any land or rent. It is in that context that the learned judge disagreed and found on the totality of his reasoning, that the "entry" referred to in the sections was in the context of the exercise of some right of possession and did not relate to a mere right of passage. Consequently, after analysing the three sections the learned judge concluded at paragraph [12] that:

> "Manifestly therefore the Limitation of Actions Act has no application to a claim to exercise prescriptive rights. It only applies in this regard to claims for ownership, possession or rent."

[46] I agree with the finding of the learned judge. The sections cannot bear the strain of the interpretation that learned Queen's Counsel for the applicants advanced. The

correctness of the conclusion of the learned judge is demonstrated by a consideration of the definition of "land" in section 2 of the LAA, which informs the subject matter to which section 3 of the LAA applies. That definition makes it clear that "land" includes only corporeal hereditaments and not incorporeal hereditaments such as easements.

[47] The decision in **Icebird Limited v Alicia P Winegardner** is very instructive. In that case the Judicial Committee of the Privy Council made it clear that the Limitation Act 1995 of The Commonwealth of the Bahamas, which is similarly worded to the Jamaican LAA, did not apply to bar the enforcement of an easement, as an easement does not fall within the definition of "land".

[48] The relevant facts of **Icebird Limited v Alicia P Winegardner** are that the appellant, Icebird Limited, is the fee simple owner of Lot 11 Block 1 Lydford Cay Estate and the respondent, Ms Winegardner, the fee simple owner of Lot 3 Block 5 in the same estate. The appellant claimed the benefit of a right of way running from its property down to the beach over servient land forming part of Lot 3. The right of way was created by a conveyance in 1954 between the then owners of the estate, of which both Lot 11 and Lot 3 form part, and the appellant's predecessors in title to Lot 11. Lot 3, including the roadway over which the right of way was granted, was conveyed to the respondent's predecessors in title in 1960, with the conveyance being expressed to be subject to the right of way granted by the 1954 conveyance. In 1968 the appellant's predecessors in title to Lot 11 and the respondent's predecessors in title to Lot 3 executed a deed of release which reduced the width of the right of way. The appellant alleged that from about 1998 the respondent had by various means obstructed its right of way.

[49] The respondent's defence was first that the right of way had never been exercised by the appellant and must be taken to have been abandoned and, second, that the causes of action sued upon did not arise within 20 years of the commencement of the cause of action and were therefore time barred.

[50] At paragraph 16 of the judgment, Lord Scott of Foscote writing for the Board addressed the issue of the time-bar as follows:

> "Finally, there are the time-bar points. Their Lordships feel bound to say that the respondent's submissions based on the effect of the Limitation Act 1995 and its statutory Predecessors appear to them to be misconceived. The appellant's claim is not a claim for the recovery of land and is not subject to the twelve year limitation period for such a claim prescribed by section 16(3) of the 1995 Act or to the twenty year period prescribed by section 1 of the Real Property Limitation Act 1874. Neither of these statutory provisions has any application to a claim for an injunction to restrain interference with an easement. If the appellant's easement is still subsisting, i.e., has not been extinguished by abandonment, interference with it is a common law nuisance. Future interference can be restrained by an injunction. Past interference can be remedied by an award of tortious damages. The limitation period applicable to a claim for tortious damages for nuisance is six years. It follows that if the appellant succeeds in its claim based on interference with its right-of-way it can expect to obtain an injunction and damages limited to the period of interference starting six years before the commencement of the action. If the present action were to be struck out, there would be nothing, bar payment of the costs of the present action, to prevent the appellant from commencing a fresh action in which the same result would be reached as if it had been the present action that had been prosecuted to judgment. The only difference would be that the period for which damages would be claimable would commence six years before the commencement of the new action."

[51] Implicitly, therefore, the disjunctive interpretation of the LAA urged by the applicants that a right of passage over land could in the circumstances of this case be subject to being extinguished by the land being acquired by adverse possession, is incompatible with the decision in **Icebird Limited v Alicia P Winegardner**.

[52] The court also accepts the submissions of Mr Hylton that, while section 70 of the RTA establishes the indefeasibility of registered title under the Torrens system, the proviso to that section supports the conclusion that any title acquired by the applicants through adverse possession, would be subject to the easement subsisting at the time of acquisition. Section 70 and its proviso provide:

> 70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be **deemed to be subject to** the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to **any easement required by enjoyment or user, or subsisting over or upon or affecting such land**, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument." (Emphasis supplied)

[53] Therefore, if the applicants acquire the reserved road by adverse possession, they would take title to it, subject to the easement in favour of the respondent. However, as they would now enjoy a unity of possession and ownership regarding the reserved road, the easement would, by those facts, be extinguished for them.

[54] Given the point about the effect of unity of possession and ownership on an easement it is convenient here to discuss the case of **Littledale v Liverpool College**. The headnote is sufficient to outline the facts and what was decided.

> "The defendants were the owners of two fields between which was a strip of land separated from them by hedges. This strip had been conveyed to the defendants with the fields, but the plaintiffs had a right of way over it to a field belonging to them. The strip was originally open at both ends, the end farthest from the plaintiffs' field communicating with a public road. More than twelve years before the commencement of the action the plaintiffs had erected a gate at each end of the strip, and had since kept these gates locked, the keys being retained by themselves or their tenants. The gate at the road end of the strip was placed upon the strip; it was not clear whether the other gate was placed on the strip or on the plaintiffs' own land. The action was brought to restrain the defendants from trespassing on the strip. There was no evidence that the plaintiffs had erected the gates with the intention of excluding the defendants from the strip:-
>
> *Held*, that, as the act of the plaintiffs in erecting and locking the gates was in its nature equivocal and might have been done merely with the intention of protecting the plaintiffs' right of way from invasion by the public, the defendants had not been dispossessed of the strip of land, and the plaintiffs had not acquired a title to it under the Statute of Limitations.
>
> The action was accordingly dismissed."

[55] As submitted by learned Queen's Counsel Mr Hylton, that case is distinguishable on the facts, as it considered a situation where the plaintiff-owner of the dominant tenement sought to acquire by adverse possession, property owned by the defendants, the subject of the servient tenement. In the case at bar, the applicants who are the proprietors of one dominant tenement have sought to acquire the servient tenement of a third party and to bar the respondent proprietor of the other dominant tenement, from the continued benefit of the right of way over the servient tenement.

[56] The claim for adverse possession was unsuccessful in **Littledale v Liverpool College**, because the intention of the plaintiffs in blocking access to the servient tenement was equivocal. I, however, agree with the argument of Mr Hylton, that, had it been successful, the easement would have been extinguished on the common law basis of unity of possession as the right of way is attached to the title of the dominant tenement and not the title of the servient tenement. I, therefore, also agree with Queen's Counsel's

observation that, if the applicants succeed in their claim of adverse possession the easement would be extinguished for them, not because the easement itself was acquired by adverse possession, but because through unity of possession (and ownership) there would no longer be a need for it. However, I agree and hold that, additionally, it is clear that the easement would remain for the benefit of the respondent.

[57] The other case relied on by learned Queen's Counsel Mrs Kitson, **Amritharaja and another v White and another**, I find also does not advance the case of the applicants. It did not consider whether an easement could be the subject of a claim for adverse possession, which is the nub of the applicant's case. Rather it dealt with the appellant's claim for adverse possession of property that was included in the respondents' title. Mr Hylton posited, and I agree, that the case would have been relevant if the applicants were claiming adverse possession of land in the respondent's, as opposed to a third party's title; but that is not the case here.

[58] Accordingly, based on the analysis conducted, I am of the view that the learned judge was correct in concluding that the LAA does not bar an action to enforce a prescriptive right to passage over land.

Issue b

[59] Counsel for the applicants did not advance any submissions challenging the manner in which the learned judge addressed the issue of abandonment. However, when the query was raised concerning the stance of the applicants on the issue, Queen's Counsel, in effect, pointed out that the issue was not completely "abandoned" as the draft notice of appeal includes a challenge to paragraph [17] of the judgment of the learned judge, in which he included some of his analysis on the issue.

[60] The issue may be addressed fairly briefly. Charles Harpum, learned author of Megarry and Wade's The Law of Real Property 6th Ed stated at Ch 18-186, page 1148, as follows:

> "Abandonment of an easement or profit will not be lightly inferred. An owner of property does not normally wish to divest himself of it even though he may have no present use for it. Mere nonuser will not of itself suffice therefore, even if accompanied by a mistaken belief that the right had been extinguished. It is now clear the non-user for a period of 20 years will not raise a presumption of abandonment despite earlier authority which suggested otherwise. It must be proved that the person having the right intends to abandon it, that is that neither he nor any of his successors in title intends thereafter to exercise it. It is one thing not to assert an intention to use a way and another thing to assert an intention to abandon it."

[61] The issue of abandonment was addressed in the case of **Icebird Limited v Alicia P Winegardner**. At paragraph 14 Lord Scott of Foscote writing for the Board stated that:

> "The main issue in the action appears to their Lordships to be whether the appellant's right-of-way must be taken to have been abandoned by non-use...It is to be borne in mind, also, that even very long non-use of an easement is not by itself sufficient to establish extinguishment of the easement by abandonment. There must also be established an *intention* to abandon the easement, and whether an inference of the requisite intention can be drawn from even, say, fifty years of non-use is a moot question."

[62] The undisputed evidence before the learned judge and that relied upon by the applicants, is that they have fenced and effectively barred the respondent from using the reserved road for many years. It is in those circumstances and in light of the authority of **Icebird Limited v Alicia P Winegardner** that the learned judge opined at paragraph [18] of his judgment that:

> "There is not much, by way of affidavit evidence, to support the assertion that the right of way has been abandoned because it has not been used since the 1950's. In any event it must be a rare case indeed that a party, who fails to exercise a right of way which has been fenced, could be said to have the necessary intent to abandon."

[63] In light of the above, I am inclined to adopt the submission of Mr Hylton that the finding of fact on the issue of abandonment by the learned judge is unassailable. It, therefore, would not found a basis for a successful ground of appeal.

[64] In light of the decision to which I have arrived on the absence of a real chance of success for the applicant's appeal, it follows that the application for the stay of execution will naturally be refused.

Conclusion

[65] Based on the analysis conducted I have concluded that even if the applicants successfully acquire the reserved road through adverse possession that will not extinguish the respondent's right of way over the reserved road. I have also found that there is no realistic prospect of the applicants succeeding in their appeal on the issue of abandonment of the right of way. Accordingly, the application for permission to appeal against the orders of the learned judge and for a stay of execution of his order that "[a] case management conference for the assessment of damages and the consideration of other remedies to be fixed", should be refused.

BROWN JA (AG)

[66] I too have read in draft the judgment of my brother D Fraser JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA

ORDER

1. The application for permission to appeal the orders of Batts J made on 1 March 2022 is refused.

2. The application for a stay of execution of that part of the order of Batts J that, "A case management conference for the assessment of damages and the consideration of other remedies to be fixed", is refused.

3. Unless submissions proposing a contrary order are filed and served within seven days of the date of this order, costs are awarded to the respondent to be agreed or taxed.