JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00001

BETWEEN	**CARLTON COAKLEY**	**1ST APPLICANT**
AND	**MICHELLE COAKLEY**	**2ND APPLICANT**
AND	**EARL JACKSON**	**RESPONDENT**

Miss Judith Clarke instructed by Mrs Charmaine Smith Bonia for the applicants

Miss Janene A Laing for the respondent

11, 18 February and 5 March 2020

IN CHAMBERS

SIMMONS JA (AG)

[1] This was an application for a stay of the execution of the judgment of Her Honour Miss M Moyston entered on 20 February 2017 in the Parish Court for the parish of Portland. The applicants had also applied for the interlocutory injunction, which was granted in that court on 29 March and modified on 17 May 2010, to be reinstated. The grounds on which the application was based are summarised as follows:

(i) The notice and grounds of appeal were filed on 9 March 2017.

(ii) The notes of evidence and reasons for judgment have not been provided.

(iii) The stay is necessary to preserve the status quo pending the determination of the appeal.

(iv) The applicants have and will continue to suffer irreparable harm, prejudice and loss if a stay is not granted.

(v) There will be no prejudice to the respondent if the application is granted.

(vi) Damages are not an adequate remedy for the applicants based on the circumstances of the case.

(vii) The appeal has a real prospect of success and it is in the interests of justice that a stay of the execution of the judgment is granted.

[2] Upon hearing the parties' submissions, I made the following orders:

> "(1) Stay of execution is granted pending appeal.
>
> (2) Upon the applicants having given the usual undertaking as to damages an injunction pending the appeal is granted in favour of the applicants in the following terms:
>
> (i) The respondent is to allow the appellants to use the roadway and the pedestrian side of the gate whenever they are in Jamaica;

(ii) The respondent is to provide the applicants with a key for the gates, for their exclusive use;

(iii) The applicants are to bear the cost of obtaining the keys.

(3) No order as to costs."

[3] This is a fulfilment of the promise to provide reasons for this decision.

Background

[4] The first applicant, Mr Carlton Coakley, purchased all that parcel of land part of Boundbrook in the parish of Portland registered at Volume 1332 Folio 404 of the Register Book of Titles (the property) since 1988. The Certificate of Title is, however, dated 30 November 1999.

[5] The second applicant was registered as a joint tenant by deed of gift dated 29 October 2010.

[6] The respondent is their neighbour. His property is registered at Volume 1039 Folio 579 (the neighbouring property).

[7] A grant of a right of way, dated 20 March 2000, was endorsed on the title for the property over land registered at Volume 1047 Folio 583 (the other property). It provides a right in perpetuity to the applicants to use an area which is 2.44 metres wide to access their property. A survey diagram prepared by Horace A Manderson shows that the applicants' access to that right of way has been restricted by the construction of a building and all that remains is a pathway measuring 1.38 metres.

[8] The applicants had been using an access road (the roadway) which formed part of the neighbouring property to access the property for some time. The period of time for which this was done is a matter in dispute. The respondent erected a gate on the neighbouring property leading to the access road to the property thereby denying them access to the roadway. Consequently, in 2009 the applicants filed a claim seeking damages for trespass of easement and an injunction directing the respondent to remove the gate.

[9] In that claim, the applicants asserted that they had previously enjoyed unrestricted access to the roadway for 21 years. It was also stated that both parties had the impression that the said roadway was not a part of the respondent's land. In the alternative, it was asserted that the roadway is an easement by implication. It was also pleaded that since they had been using the roadway for over seven years, section 45 of the Limitation of Actions Act was applicable.

[10] On 29 March 2010 an injunction was granted in the following terms:

> "(1) An interlocutory injunction be granted as prayed.
>
> (2) That the Plaintiffs be allowed to continue using driveway whether to walk or drive until the matter is determined in court and if and when the Plaintiffs use the gate they are to lock it back.
>
> (3) The Defendant is to provide the Plaintiffs with a key as soon as possible for the pedestrian side of the gate.
>
> (4) The Defendant is also to provide a remote in seven (7) days for the main section of the gate for the pedestrian side of the gate.
>
> (5) Costs for the keys and remote to be borne by the Plaintiffs."

[11] On 20 February 2017 after trial, it was ordered as follows:

> "(1) Judgment for the Defendant.
>
> (2) The interlocutory injunction granted to the Plaintiff on the 29th day of March 2010 and modified on the 17th May 2010 is hereby discharged.
>
> (3) Cost[s] to the defendant to be agreed or taxed."

[12] The applicants filed a notice of appeal based on the following ground:

> "The learned judge erred in law when she [found] that the Plaintiffs/[Applicants] have not acquired an easement over the Defendant's property registered at Volume 1039 Folio 579 whether by way of mistake, prescription, necessity and or by the Plaintiffs'/[Applicants'] Registered Title."

[13] On 7 January 2020 a single judge of this court granted an interim stay of the order of the learned Parish Court judge and directed that the matter be set down for an inter partes hearing. The order states:

> (1) Temporary stay is granted;
>
> (2) Interim injunction granted in terms set out in paragraphs 2 to 5 of the formal order of the Parish Court Judge M Moyston dated 29 March, 2010.
>
> (3) Application set for inter partes hearing on 14 January 2020 at 2:30 pm.
>
> (4) Order for stay and injunction to be served by the applicant.

[14] On 14 January 2020 the inter partes hearing did not take place and Straw JA made the following orders:

"(1) The temporary stay granted on January 8, 2020 is lifted and the inter partes hearing now set for February 11, 2020 at 2:00 pm.

(2) No order as to costs.

(3) Applicant to file affidavit in response on or before January 28, 2020. Any further affidavit if necessary to be filed on or before February 4, 2020.

(4) Applicant to draft and file above orders."

The affidavit evidence

[15] The applicants in their affidavit stated that they reside abroad and are only in Jamaica two times each year. They stated that the right of way is now occupied by their neighbour's house and that it is impractical for them to use that route to access the property.

[16] They indicated that, since July 2009, they have been denied access to the property through the roadway which is used by them and the respondent as the respondent erected a gate which was also locked. Their evidence is that they have had to access their home by using an old train line at the rear of the property which is covered in bushes and gets muddy when it rains. At those times, they stated, that they have had to climb over a neighbour's fence to get home. They asserted that it is both a security and health risk for them to use that area.

[17] They also gave an undertaking as to damages based on their ownership of property in the jurisdiction.

[18] Their evidence is that they improved the roadway at their expense and have been using it for 21 years unmolested. It was also indicated that both parties are of the view

that the roadway was not part of the respondent's land. They have claimed an easement by implication or, alternatively, by acquiescence in excess of seven years and thus section 45 of the Limitation of Actions Act.

[19] The respondent in his affidavit stated that he has been the owner of the neighbouring property for over 40 years. He indicated that when the applicants moved to the property the second applicant indicated to him that she was informed by the first appellant to access their home using the train line or the right of way. He denied that they used the roadway for over 21 years and asserted that at all times it was understood that the roadway which had been constructed by him was on his land.

[20] He asserted that the right of way is six feet wide and therefore accessible to the applicants. He also indicated that it is because of a wall that they have built that the applicants can no longer access the property.

[21] The respondent denied that any easement has been created over his property and states that the applicants have two alternative means of access to the property. He also indicated the route to the rear of the property is an established road.

[22] He asserted that if an injunction is granted he will be prejudiced as his use of his property will be restricted and the applicants have allowed persons unknown to him to access his property. He has also alleged that the applicants' caretaker has and others have thrown debris on his property.

[23] The respondent has asserted that damages will not provide an adequate remedy and the balance of convenience is in his favour as the applicants reside abroad. He has also raised the point that the second applicant is not a registered owner of the property.

[24] On 5 February 2020 the second applicant responded to the respondent's affidavit. In her affidavit she refutes the respondent's claim that the applicants had not been using the roadway as claimed. Her evidence is that she has been living at the property since 1993 and had unrestricted access to the roadway up until 2009. She further stated that all that remains of the right of way is a foot path. This she said has been the situation even before the first appellant purchased and/or obtained title for it. She also indicated that the wall was built by them in 2001 to secure the property as they had acquired pit bulls. She has also maintained that the respondent did not contribute to the building of the roadway.

[25] The second appellant has also asserted that there will be no prejudice to the respondent if the stay is granted pending the appeal as this would restore the parties to the position which existed whilst the matter was before the Parish Court. She also stated that the respondent can also access his property through the front gate which is situated on Boundbrook Avenue.

[26] She exhibited a copy of the Certificate of Title which shows that both applicants have been registered owners of the property since 29 October 2010.

Applicants' submissions

[27] Miss Clarke submitted that in order to grant a stay of the execution of a judgment there must be some merit in the appeal. Once that test is satisfied the court should grant the order which is less likely to produce injustice. Reference was made to **Arc Systems Limited v Atradius Credit Insurance (NV)** [2014] JMCA App 9, in support of that submission, where Harris JA stated:

> "[22]…Over the past 15 years, there have been in place modern authorities defining the test by which the court ought to be guided in giving consideration to the question of a stay of execution. In granting a stay of execution, in Linotype Lord Staughton propounded the test to be one in which the applicant must show that the appeal has some prospect of success and without a stay he would be ruined. In the continuing development of the law, the test as to the grant or refusal of a stay has been redefined in the more recent authorities of ***Hammond*** and ***Combi (Singapore) Pte Limited v Ramnath and Sun Limited*** [1997] EWCA 2164 (23 July 1997).
>
> [23] In ***Hammond***, Lord Clarke spoke to the test in this way:
>
> > 'Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover any monies paid from the respondent?'
>
> [28] In ***Combi,*** Phillips LJ defined the test as follows:
>
> > 'In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally,

> if there is a risk that irremediable harm may be caused to the defendant if a stay is ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course, that the court concludes that there may be some merit in the appeal. If it does not, then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice'."

[29] Counsel stated that based on the factual contentions, the applicants have maintained that they acquired a prescriptive easement over the roadway by way of their long, continuous and undisturbed user and the respondent, by his acquiescence, is estopped from denying them the right to use it. She also stated that it may be argued that the way over the roadway is a way of necessity.

[30] Miss Clarke submitted that if the respondent is denying their assertions as to the use of the roadway or that there was no acquiescence on his part or that it is not a way of necessity, there are serious issues to be tried. She stated that in the absence of the notes of evidence and the reasons for judgment, the court has to rely on the documents grounding the claim and the affidavits in order to assess the merits of the appeal. Counsel submitted that, in those circumstances, there can be no contention that there is no merit in the appeal.

[31] Where the risk of injustice is concerned, reference was made to **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and another** [2011] JMCA App 1, where Harris JA stated:

> "[24] In balancing the risks in granting or refusing a stay, the evidentiary material before the court must justify an order for a stay.

> The risks would not only flow from the merit of a party's appeal but would also revolve around the question as to which party would be more likely to suffer harm."

[32] Counsel made the point that the court, in balancing the risks, must ensure that the appeal is not stifled. She stated that if the respondent utilizes the land on which the roadway is situated in a way that will permanently exclude the applicants or if he sells the land to a bona fide purchaser for value without notice, the appeal when its heard may amount to nothing more than an academic exercise. Miss Clarke, having referred to the respondent's affidavit in which it was stated that he uses that area to store his equipment and for extra parking, stated that in the absence of a stay there is a risk that permanent structures may be erected in that area. If this happens the appeal would be stifled.

[33] She argued that the risks to the applicants if the stay is refused far outweigh that to the respondent whose complaint is that he would be restricted in the use of the land and is uncomfortable with strangers having access to his property. In this regard, Miss Clarke referred to the applicants' evidence that the alternate route presents a safety and security risk. They have also stated that they cannot transport large items of furniture via that route.

[34] Counsel submitted that if the stay is granted the parties would be restored to the position they enjoyed until 2009 when the gate was erected. She stated that there will be no prejudice to the respondent as the parties used the roadway without incident or inconvenience to each other. This, she said, would be in the best interests of justice.

Respondent's submissions

[35] Miss Laing submitted that the application ought to be refused as there is no merit in the appeal. She submitted that an easement by prescription arises by effluxion of time and the user must be open, adverse and continuous. She stated that it is akin to adverse possession. Counsel also stated that if the respondent gave the applicants permission to use the roadway that will not give rise to an easement by prescription. It was submitted that the applicants' claim to an easement by prescription must fail.

[36] With respect to whether they have an easement by way of necessity, it was submitted that the applicants do in fact have access to the property. In this regard, counsel referred to the right of way over the neighbouring property.

[37] Where easement by way of acquiescence is concerned, Miss Laing submitted that such an easement is based on a situation in which the owner of the land encourages the other person to use it. That person must have relied on the words or actions of the owner and acted to his detriment. Reference was made to **Crabb v Arun District Council** [1976] Ch 179 in support of that submission. Counsel stated that there is no evidence of and encouragement on the part of the respondent or that the applicants acted to their detriment. Miss Laing stated that a failure to act does not amount to encouragement. She also indicated that the issues are joined as to whether the applicants built the roadway.

[38] With respect to the assertion that the appeal will be stifled if no stay is granted, counsel submitted that the matters raised by Miss Clarke are all speculative. She made

the point that, as stated in **National Commercial Bank (Jamaica) Limited v Olint** [2009] UKPC 16, it is "impossible to stop the world pending trial".[1]

[39] In response to Miss Clarke's assertion that the respondent only became aware that the roadway was on his land in 2009, it was submitted that a land owner was not prevented from asserting his legal right against a person who has infringed that right on the ground of acquiescence unless he was aware of the right all along. She stated that if in fact the respondent only became aware that the land on which the roadway is situated belonged to him in 2009, that would defeat any claim of an easement by acquiescence. Reference was made to **Armstrong v Sheppard and Short Ltd** [1959] 2 Q.B. 384 at 396 in support of that submission.

Discussion and analysis

[40] By virtue of rule 2.11(1)(b) of the Court of Appeal Rules (CAR), a single judge of appeal has the power to make an order for the stay of execution of any judgment or order against which an appeal has been made, pending the determination of the appeal. This power is a discretionary one and is unfettered. In Halsbury's Laws of England 4th Edition, Volume 17 at paragraph 455, the learned authors state:

> "The court has an absolute and unfettered discretion as to granting or refusing of a stay, and as to the terms upon which it will grant it and will as a rule, only grant a stay if there are special circumstances, which must be deposed to an affidavit unless the application is made at the hearing."

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[1] Paragraph 16

[41] The approach of the court in the determination of such applications has evolved throughout the years. The traditional approach as can be gleaned from **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, required the applicant to demonstrate that: (i) the appeal had some prospect of success; and (ii) without the stay he would be financially ruined.

[42] In recent times, a more liberal approach has been adopted. It is now accepted that the exercise of the court's discretion is dependent on the circumstances of the case with specific focus on the risk of injustice. In doing so, a court must also be cognizant of the principle that a successful litigant ought not to be lightly deprived of the fruits of his judgment.

[43] In **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another**, Harris JA observed that the court's current approach is to "seek to impose the interests of justice as an essential factor in ordering or refusing a stay". In that case the learned judge of appeal referred to **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA Civ J0723-9, where Phillips LJ stated the principle in the following terms:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where

> there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[44] This approach was endorsed by the court in **Sagicor Bank Jamaica Limited v YP Seaton and others** [2015] JMCA App 18, where McDonald-Bishop JA stated:

> "…It is now accepted, on later authorities, that whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice (see **Hammond Suddard Solicitors v Agrichem International Holdings** [2001] All ER (D) 258). The essential question is according to the authorities, whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay."[2]

Whether the appeal has some prospect of success

[45] A real chance of success has been decided by the authorities to mean a realistic as opposed to a fanciful prospect of success (see **Swain v Hillman** [2001] 1 ALL ER 91). This principle was recently applied by this court in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Elaine Wallace** [2015] JMCA App 27A, wherein Morrison JA (as he then was), referring to the dictum of Lord Woolf from **Swain v Hillman** [2001] 1 All ER 91, observed as follows:

> "[21] This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in Swain v Hillman and another [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'… So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be

[2] Paragraph [50]

granted, he will have a realistic chance of success in his substantive appeal."

[46] Counsel for the applicants has argued that an easement has been created by either acquiescence, necessity or by prescription. Miss Laing's position is diametrically opposed to that assertion. She argued that no easement of any kind has been created. She also stated that the applicants have an alternative means of access to the property.

[47] In order to determine whether the appeal has some prospect of success I propose to examine the factors which would need to be established in order for a court to conclude that an easement had been created. I am, however, mindful of the fact that I should not embark on a course which would trespass on the ground to be covered in the substantive appeal (see **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 at paragraph [30]).

[48] The issues which the learned Parish Court judge would have had to determine are:

(1) Whether the applicants had been using the roadway for over 21 years;

(2) If so, whether the respondent permitted them to do so or acquiesced to that user; and

(3) Whether the applicants acquired an easement by way of necessity.

[49] In order to acquire an easement by way of prescription, the applicants would have had to prove that they enjoyed the use of the roadway, unmolested for a period of 20 years. Section 2 of the Prescription Act states:

> "When any profit or benefit, or any way or easement, or any watercourse, or the use of any water, a claim to which may be lawfully made at the common law, by custom, prescription or grant, shall have been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen, or of any person, or of any body corporate, by any person claiming right thereto, without interruption for the full period of twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

It is clear from the foregoing that the consent or agreement of the owner of the land would negative the acquisition of any prescriptive right. This is so because the user must be as of right (see **Healey v Hawkins** [1968] 3 All ER 836).

[50] Acquiescence involves knowledge of the act done, the power to stop the act or take legal action in respect of it and the failure to exercise that power. Where permission is given there can be no acquiescence. Similarly, where the owner does not know that the act is being done there can be no creation of a prescriptive right.

[51] An easement by way of necessity arises where land which is surrounded by other land is subdivided by the owner and sold or given to another, cannot be accessed or used without that right of way. In other words, it is land locked. In **Union Lighterage Company v London Graving Dock Company** [1900 U. 467] [1902] 2 Ch 557, Stirling LJ stated:

> "An easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property."

[52] In this matter, the right of way over the neighbouring property which was acquired one year after the applicants purchased the property has been largely overtaken by a building which was erected by that neighbour. It does, however, appear that the applicants would have been able to use the corridor which remains to access the property had they not constructed a wall. They can also access the property via the back property which they have described as being unsafe and inconvenient. Whilst they may not have vehicular access to the property, any argument that they have no access does not, in my view, have any real prospect of success.

[53] The issue of whether the applicants have been using the roadway for over 21 years is a live one. So too is the question of whether the parties knew that the roadway is situated on the respondent's land. The respondent has asserted that he did not grant an easement to the applicants and they have not stated that they constructed and/or used the roadway with the respondent's permission. The parties are also at variance in respect of who funded its construction. In the absence of the notes of evidence and the reasons for judgment it is at best, unclear how the learned Parish Court judge arrived at the conclusion she did.

[54] I also bear in mind that her findings will only be disturbed if it can be shown that the learned Parish Court judge was demonstrably wrong (per Morrison JA (as he then was) in **Attorney General v John McKay** [2012] JMCA App 1, at paragraph [20]). At this stage, giving of a definitive answer to the question of whether this appeal has some

prospect of success is a challenge. The affidavit evidence raises issues of fact which in the ordinary course of things would have been resolved by the trial court.

[55] The failure of the Parish Court judge to provide the notes of evidence and the reasons for judgment has placed this court in an invidious position. Any decision is therefore based on the limited information which has been provided by the parties who are now represented by different counsel who can shed no further light on the matter.

[56] Based on the affidavit evidence, I am of the view that the appellants may have plausible arguments in respect of the issue of whether an easement has been created. At this stage, it cannot be said with any degree of certainty that their case is devoid of merit.

Risk of injustice

[57] Having formed the view that the applicants' case in respect of whether an easement may have been created by prescription is arguable, the risk of injustice to the parties must now be considered.

[58] The court in the exercise of its discretion in an application for a stay of execution is required to balance the interest of both parties. In **Sagicor Bank Jamaica Limited v YP Seaton and others** McDonald-Bishop JA stated:

> "[80] Morrison JA, in speaking to the exercise of a judge's discretion in treating with an application for stay of execution pending appeal, usefully noted in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 at paragraph [10]:

> '[10] It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay'."

[59] The applicants have argued that there is a real risk of injustice to them if a stay is not granted. Miss Clarke stated that there is a possibility that the land where the roadway is situated may be utilized in such a manner that even if the applicants succeed in their appeal, it will be rendered nugatory. Miss Laing has argued that whatever injury they may suffer can be cured by an award of damages and as such the respondent ought not to be deprived of the fruits of his judgment.

[60] Whilst no evidence has been presented which suggests that the respondent will take any such action, when one considers what has occurred in respect of the right of way, there may be need for some pause. The applicants are elderly. At the present time they do not have vehicular access to the property. The respondent is also elderly. He operates a business and is concerned that strangers will be able to access his property via the roadway. He also has another gate on the Boundbrook main road.

[61] The risk of injustice being done to the applicants is, in my view, greater than that which may be suffered by the respondent.

[62] In the circumstances, it is my view that the justice of the case calls for the granting of the orders sought in the applicants' application as it arguable that the applicants acquired an easement by prescription.

The application for injunctive relief

[63] The principles applicable to the grant of injunctive relief have been well traversed in these courts.

[64] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of **American Cyanamid v. Ethicon** [1975] 1 All ER 504. In that case, Lord Diplock stated that before granting an injunction the court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried. Secondly, if there is a serious issue to be tried, the court has to consider whether damages would be an adequate remedy. Thirdly, if damages would not be an adequate remedy, whether the defendant would be adequately compensated under the claimant's undertaking as to damages. In the event that there is doubt as to the adequacy of damages and whether the claimant's undertaking would provide enough protection for the defendant the court must then decide where the balance of convenience lies.

[65] In this matter, having found that the appeal is not completely devoid of any prospect of success, it is my view that there is a serious issue to be tried.

[66] Where the issue of whether or not damages would be an adequate remedy is concerned, the general principle is that in matters concerned with land damages may not be adequate. In **Lookahead Investors Limited v Mid island Feeds (2008) limited and others** [2012] JMCA App 11, Brooks JA stated:

> "[38] I cannot agree with learned counsel for the respondents that damages would be an adequate remedy in the event that Lookahead is successful at the trial. I am inclined toward the school of thought

> that contends that, where land is concerned, it is presumed that damages are not an adequate remedy, and no enquiry should ever be made in that regard. The reason behind that thinking is that each parcel of land is said to be "unique" and to have "a peculiar and special value" (see page 32 of Specific Performance 2nd Ed. by Gareth Jones and William Goodhart). That reasoning may be found in the judgement of Hardwicke LC in **Buxton v Lister & Cooper** (1746) 3 Atkyns Reports 383, when he said at page 384:
>
> > 'As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, **it is on a particular liking to the land, and it is quite a different thing from matters in the way of trade**.' (Emphasis supplied)"

[67] The above principle is also applicable where the land concerned is commercial property. In this matter, the roadway, has been the applicants' preferred means of access to their property for various reasons. Based on the foregoing I find that damages would not be an adequate remedy.

[68] It must now be considered whether the respondent would be adequately compensated under the applicants' undertaking as to damages. In **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16, their Lordships stated that the court should make its decision based on the course that would cause the least irremediable prejudice. Lord Hoffmann who delivered the decision of Board stated:

> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to

one party or the other. This is an assessment in which, as Lord Diplock said in the ***American Cyanamid*** case [1975] AC 396, 408:

> 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

> 18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

> 19. …What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted'."

[69] In light of the respondent's evidence regarding his use the area occupied by the roadway I am of the view that the undertaking will provide adequate compensation to him for any inconvenience suffered. I am also of the view that the injunction is not likely to cause irremediable harm to the respondent. The applicants are the ones who are most exposed to irremediable harm. The balance of convenience is therefore in their favour. Additionally, stipulations can be put in place to address the respondent's legitimate concern for his safety. Use of the roadway will be restricted the appellants themselves.

[70] I would, therefore, grant the injunction pending the appeal. I am however mindful that this matter is of some vintage. As such the appeal should be set down for hearing within the shortest reasonable time.

Conclusion

[71] It is for the above reasons that I made the orders set out in paragraph [2] of this judgment.