JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 112/2017

APPLICATION NO 4/2018

BETWEEN	**ALFRED SAMUEL EDWARDS**	**1ST APPLICANT**
AND	**IAN HARRIOTT**	**2ND APPLICANT**
AND	**RUPERT BROWN**	**3RD APPLICANT**
AND	**SHANE BROWN**	**4TH APPLICANT**
AND	**PATRICK PATTERSON**	**5TH APPLICANT**
AND	**MARCUS STEWART**	**6TH APPLICANT**
AND	**SINCLAIR McDONALD**	**7TH APPLICANT**
AND	**THE SAINT THOMAS PARISH COUNCIL**	**8TH APPLICANT**
AND	**TROPICROP MUSHROOMS LIMITED**	**1ST RESPONDENT**
AND	**MOSSMANS PEAK FARMS LIMITED**	**2ND RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett & Company for the applicants

Miss Maliaca Wong and Miss Amanda Montague instructed by Myers Fletcher & Gordon for the 1st respondent

Manley Nicholson and Mr Marlon Gregory instructed by Nicholson Phillips for the 2nd respondent

1, 2 and 16 February 2018

IN CHAMBERS

PHILLIPS JA

[1] This is an application for stay of proceedings (in this consolidated action) of the judgment of King J given on 9 November 2017. Mr Alfred Edwards, Mr Ian Harriott, Mr Rupert Brown, Mr Shane Brown, Mr Patrick Patterson, Mr Marcus Stewart and Mr Sinclair McDonald (the 1st to 7th applicants respectively, representative of a group of 50 farmers, hereinafter referred to as the 'farmers') and the Saint Thomas Parish Council (the parish council), sought the following orders against Tropicrop Mushrooms Limited (the 1st respondent, hereinafter referred to as 'Tropicrop') and Mossmans Peak Farms Limited (the 2nd respondent, hereinafter referred to as 'Mossmans'):

> "1. A stay of proceedings in the court below pending the outcome of the appeal.
>
> 2. That the public in general and local farmers who are represented by the [farmers] be permitted to access the subject reserved road at Abbey Green via the Iron Gate pending the outcome of the appeal and to farm their respective parcels of land as enjoyed prior to the Judgment of Mr. Justice R King of the [9]th of November, 2017.
>
> 3. That having regard to the financial circumstances of the [farmers] and the importance of the appeal to the Municipal Corporations of Jamaica there be no security of costs.
>
> 4. Costs to the applicants to be agreed or taxed."

[2] The application was supported by the affidavit of joint affiants, Mr Alfred Edwards, Mr Patrick Patterson, Mr Shane Brown, Mr Robert James, Mr Okang Stewart and Mr Marcus Stewart, and was opposed by affidavits sworn to by Mr Michael Lyn and Mr Jahmar Clarke, filed on behalf of the respondents.

[3] The learned judge, in his judgment, made the declarations set out below:

> "1. The reserve road which services the land registered at Volume 1322 and Folio 20 of the Register Book of Titles situated at Abbey Green, Saint Thomas is a private road;
>
> 2. The Saint Thomas Parish Council is not entitled to remove the iron gate erected on the said road by the [Tropicrop];
>
> 3. The [farmers] [Claim No HCV 04099 of 2008] have not acquired the said lands by way of adverse possession;
>
> 4. The [farmers] do not have a public right of way over the subject reserved parochial road;
>
> 5. Consequently the relief claimed by the Saint Thomas Parish Council in [Claim No HCV 0663 of 2008] is denied with costs to the [Tropicrop] to be agreed or taxed;
>
> 6. The relief claimed by the [farmers] in [Claim No HCV 04099 of 2008] is also denied with costs to the [respondents] to be agreed or taxed."

It may be useful to set out the competing contentions between the parties in the respective claims in the court below. The claims were consolidated by Brooks J (as he then was).

[4] In Claim No HCV 0663 of 2008, Tropicrop sought two declarations against the parish council, which were granted by the learned judge in its favour, as set out in orders 1 and 2 stated at paragraph [3] herein. In its particulars of claim, Tropicrop alleged that it had purchased certain parcels of land namely circuits 1, 3A and 3B, being part of Abbey Green in the parish of Saint Thomas, containing approximately 230 acres and registered at Volume 1322 Folio 20 of the Register Book of Titles. The land was

formerly part of land comprised in certificate of title registered at Volume 1034 Folio 50. Tropicrop claimed that the lands were serviced by a private reserve road. The land had been purchased from Mr Cecil Langford, who had cut the private road to service the said lands. He sold the lands to Abbey Green Estates which subdivided the land and sold circuits 1, 3A and 3B to Tropicrop.

[5] Tropicrop pleaded that it was also in possession with Mr Gordon Langford (son of Mr Cecil Langford) of the remaining land in Volume 1034 Folio 50. Tropicrop erected an iron gate on its property, which it claimed was for the purposes of preventing squatters and thieves from accessing the property, and raiding the coffee farm located in the lands comprised at Volume 1322 Folio 20 of the Register Book of Titles.

[6] Tropicrop refuted the claim by the parish council that the road was a parochial road owned by the parish council. The parish council had ordered that the iron gate should be removed. However, Tropicrop claimed that the access road was privately owned, did not belong to the parish council, and so it had filed a claim for the court to make a declaration in that regard.

[7] The parish council pleaded that as the local government authority for the parish of Saint Thomas, it had responsibilities under the Parochial Roads Act, through the Superintendent of Roads and Works "for the exclusive care, management, control and superintendence of all highways, and all public roads, thoroughfares, streets, lanes, aqueducts and bridges in the parish". Additionally, the jurisdiction of the parish council extended to all private roads in the parish. The parish council asserted that it also had

the power to enforce the maintenance and upkeep of all roads, including private roads in the parish, and to take action to prevent nuisance and/or encroachment in respect of any of its roads.

[8] It was the parish council's contention that the subject reserve road was a parochial road falling under the jurisdiction of the parish council, and was subject to a resolution passed by the parish council at its Civic Development Planning and General Purpose Committee meeting held on 11 April 1989. The reserve road, it stated, had existed long before Mr Langford had purchased Abbey Green Estate. The parish council pleaded that the boundaries and junctions of some of the adjoining roads appeared in the schedule containing some of the parochial roads in the parish of Saint Thomas, for the period 1955-1961, published by the Herald Limited Printers of 44 Church Street, Kingston in 1956. The parish council confirmed that it had served notice on Tropicrop, under the Parochial Roads Act, to remove the iron gate, as it was impeding access to the reserve parochial road. The parish council did not accept that the iron gate had been constructed to prevent praedial larceny, but stated that it had the effect of preventing farmers, who, it pleaded, had the right of way over the reserve road, from accessing their land for farming purposes.

[9] The parish council pleaded further, that its resolution of 11 April 1989, was subsequent to the subdivision approval, which had been applied for on 20 March 1987 on behalf of the previous owners of Abbey Green Estate. The resolution of April 1989, essentially sanctioned the subdivision of approximately 330 acres at Abbey Green into two lots, subject to certain conditions. The parish council contended that prior to 11

April 1989, the reserve road had been used by the public and the local farmers to access Crown lands and Tropicrop's adjoining lands, which they had continued to do since the passing of the resolution in April 1989. Additionally, on 8 May 2008, the parish council had passed a further resolution reaffirming their jurisdiction over the reserved parochial road. Tropicrop, it stated, was in breach of condition number two in respect of the subdivision approval. They therefore denied that Tropicrop was entitled to the declarations sought.

[10] The parish council counterclaimed for a declaration that the reserved parochial road, the subject of the dispute, fell under the jurisdiction of the parish council, pursuant to the resolution of 11 April 1989, reaffirmed by the resolution of 8 May 2008. Also the parish council claimed that the Parochial Roads Act was the governing statute, and pursuant to those provisions, Tropicrop was not entitled to prevent access and/or egress of the said reserved parochial road, which fell under its suzerainty. A declaration was also sought that a right of way had been acquired by way of prescription. The parish council asked for an order for the removal of the iron gate and/or any obstruction erected by Tropicrop. It also sought an order for damages for the encroachment and or trespass on their reserved parochial road.

[11] In Claim No HCV 04099 of 2008, the farmers (the 1st to 7th applicants set out in paragraph [1] herein) claimed against Tropicrop and Mossmans (which was later added to the suit) damages for loss of profit as a result of the obstruction of the reserved parochial road at Abbey Green by Tropicrop. The farmers claimed a declaration that they had a right to farm on land claimed by Tropicrop by way of adverse possession,

and sought an injunction to restrain Tropicrop and Mossmans from obstructing the reserved parochial road.

[12] In the amended particulars of claim, the farmers pleaded that they were farmers who were a part of a representative group of 50 local farmers, who had been deprived of access to their cultivation by the illegal erection of the iron gate on the reserved parochial road by the actions of Tropicrop. The farmers claimed that they had been farming on Crown lands at Abbey Green for a period in excess of 20 years, and that the reserved road came under the jurisdiction of the parish council and the Parochial Roads Act. It was their contention that they had been using the reserved parochial road to access Crown lands at Abbey Green and beyond for a period in excess of 20 years, and the local inhabitants had been doing so for a for a period exceeding 100 years. The farmers claimed that they had been traversing the reserved road without interruption by foot, horses, vehicles, and with cattle, at all times of the year, for a period in excess of 20 years without interruption.

[13] In the alternative, the farmers claimed that they had a right to access the reserved parochial road by way of prescription. Additionally, they claimed that the reserved road was used to access the bridle path to the Crown lands of Abbey Green and beyond, and that the reserved road acted as a boundary for lots 1 and 2 of the subdivision approved by the parish council. Mossmans was a joint owner of the land registered at Volume 1034 Folio 50. The farmers contended that the reserved road had never been treated as a private road. They pleaded that the erection of the iron gate by Tropicrop was unlawful, and that although Tropicrop had been given notice by the

parish council to permit access by the farmers, they had continued to maintain the obstruction. As a consequence, the farmers claimed that they had not been able to access their coffee and vegetable crops, which they relied on for their living, and to support their families. They also claimed, that if they were on land claimed by Tropicrop, then they were there as of right, as they had enjoyed uninterrupted possession of the same for a period in excess of 20 years. If however, they were on land owned by the Crown, then they were there with the knowledge and approval of the Forestry Department, which gave them approval, both verbally and in writing.

[14] The farmers pleaded by amendment, that of the 60,950 square meters that they were occupying in the Abbey Green area, 19,770 square metres of that amount was on the land registered at Volume 1322 Folio 20 in the name of Tropicrop; 31,300 square meters was on land registered at Volume 1034 Folio 50 in the name of Tropicrop and Mossmans; and 4,150 and 4,730 square meters, were on land registered at Volume 1181 Folio 160 and Volume 120 Folio 81 of the Register Book of Titles, in the names of the Commissioner of Lands and Radnor, respectively. The farmers were claiming adverse possession of the lands owned by Tropicrop and also in respect of those lands owned jointly by Tropicrop and Mossmans.

[15] In the amended defence and counterclaim (a document disputed by counsel for the applicants as having been filed or placed before the court below), Tropicrop disputed the claim of the farmers. It asserted that it had erected the iron gate in December 2007, but on a reserved private road situate on its own premises at Abbey Green. The reserved road being a private road did not come under the jurisdiction of

the parish council. Tropicrop also maintained that the farmers had access to their cultivation through the parochial road numbered 205. It accepted that there was farming on Crown lands adjoining Abbey Green, but denied that the farmers had been farming there for a period in excess of 20 years.

[16] In fact Tropicrop claimed that:

(i) Alfred Edwards (the 1st applicant) was not in occupation of Crown lands at the material time, but was in occupation of circuit 2, Abbey Green, up to 2007 when he ceased occupation.

(ii) Ian Harriott (the 2nd applicant) had been farming on the Crown's land adjacent to Abbey Green, not for several generations as alleged, but for less than seven years.

(iii) Rupert Brown (the 3rd applicant) had been in occupation of Crown lands adjacent to Abbey Green for no more than 16 years.

(iv) Shane Brown, Patrick Patterson and Marcus Stewart (the 4th to 6th applicants respectively) had been squatting on Abbey Green for the last seven years.

(v) Sinclair McDonald (the 7th applicant) had been farming on Abbey Green for no more than seven years.

[17] Tropicrop maintained that the local inhabitants had been using the bridle road numbered 205, and not the private road at Abbey Green, for over 100 years to gain access to the Crown lands and beyond. The private road on Abbey Green had not been in existence for over 100 years, it having been cut by Mr Cecil Langford in the mid 1970's. Although Tropicrop accepted that the farmers had used the private road to access Crown lands adjoining Abbey Green, they did not accept that that use had continued for a period in excess of 20 years. That access also had not, it was asserted, been as of right, and uninterrupted as alleged. There had always been a gate to the entrance to the Abbey Green property, maintained by Tropicrop's predecessors, which had always restricted access to the property. The gate was closed intermittently between 1988-1992 when it had been hit down by unknown persons.

[18] It was pleaded further however, that the gate had been restored in 1994, and kept closed for most of the reaping season, and intermittently throughout the rest of the year up to 2002, when it had been damaged again, but had been replaced in 2007 by the subject disputed iron gate which remained permanently locked. Thus, Tropicrop stated, no rights had been acquired by the farmers over the private road by prescription or otherwise. Tropicrop accepted that there had been subdivision of Abbey Green into two titles, and indicated that it was in the process of obtaining legal interest in the lot consisting of circuit 2, where it had been in possession by consent from September 2006. Tropicrop therefore maintained that it had not blocked a parish council bridle road but had erected a gate on its own private road which it was entitled to do, and in any event, that action had not prevented the farmers from accessing their lands, as

they could be accessed by parochial road numbered 205. Tropicrop therefore denied that the farmers could claim adverse possession to the lands owned and registered in their name. It asserted also that it would not be responsible for any loss and damage if any had been suffered by the farmers.

[19] By way of a counterclaim Tropicrop claimed possession of the lands comprised in certificates of title registered at Volume 1322 Folio 20 and Volume 1034 Folio 50.

[20] Mossmans filed its own defence. Essentially it mirrored that of the defence filed by Tropicrop. Additionally it stated that it had no knowledge of the allegation that the Forestry Department or any other government agency, gave approval to the farmers to farm the Crown lands for any particular period or otherwise. Furthermore, it did not accept that the private reserved road had been worked on through the efforts of the local Member of Parliament, the farmers, and members of the local communities in the Cedar Valley Division, as that it pleaded, would have had no legal effect, and would have amounted to trespass on private property.

[21] There were other replies filed, but in the main, the competing contentions remained the same as set out in the initial pleadings as recounted above.

[22] There were several witness statements filed in the consolidated action. There was detailed cross-examination on them. I am aware that the applicants complain that the learned trial judge did not take into account the detailed evidence in chief given by way of the witness statements, deponed to by witnesses for the applicants, particularly the Commissioned Land Surveyor, Mr Richard Stewart, and that of Councillor Deverell

Dwyer and Clinton Gordon, Secretary Manger of the parish council. They were put before me and I have read them. However, the respondents have also submitted that some of the statements made in the witness statements adduced on behalf of the applicants were expunged at trial. Additionally, there was cross-examination of the witnesses which may have altered significantly what was stated in their witness statements originally. I do not have the benefit of the notes of evidence of the proceedings which took place in the court below, so I would be significantly hampered with regard to knowing exactly what evidence was adduced in the trial before King J. I have therefore examined what the learned judge has noted that he has recalled of the evidence in relation to the issues in this case, his findings on the evidence and ultimate conclusions, in order to ascertain whether the grounds of appeal have a realistic chance of success.

[23] In paragraph [14] of King J's judgment he identified the facts in issue in both claims as follows:

> "[Claim No HCV 0663 of 2008]:
>
> (i) Whether the road was being used as a private road exclusively by Abbey Green or whether the public had unrestricted access to the road;
>
> [Claim No HCV 04099 of 2008]:
>
> (ii) whether the farmers were allowed to use the road before and/or after Tropicrop's acquisition."

He identified the issues of law in Claim No HCV 0663 of 2008 as follows:

"i) The jurisdiction of the Parish Council, if any over the road;

(ii) Whether Tropicrop has the right to install a gate on the disputed road;

(iii) Whether Tropicrop created an easement by allowing access to the disputed road; and

(iv) Whether the farmers were there as licensees or whether their claims to adverse possession are valid."

The learned judge did not specifically identify the issues of law in Claim No HCV 04099 of 2008 in the same way as he had done in respect Claim No HCV 0663 of 2008.

[24] In paragraph [42], he stated his findings of facts in issue.

For Claim No HCV 0663 of 2008, he stated:

"● Overall evidence of [the farmers] does not point to longstanding use of the road by the public or the farmers. Farmers using it presented evidence that their use was as a result of their parents' employment to Abbey Green with recent use as a result of their squatting on Abbey Green and surrounding lands.

● The oldest witness is John Allgrove whose evidence dates back to childhood and whose evidence points to the road being used by Abbey Green for private purposes. Notably, the gate was relocated...

● The Parish Council witnesses were not of much help in this regard.

● There is evidence that a gate was always in existence at Abbey Green as far back as the first owners of Abbey Green. This is so when Abbey Green changed hands in 1988 and when the balance was purchased in 2006.

● As to the use of the road by the farmers after the acquisition by Tropicrop, the decision on this issue lies

in the competing evidence of the farmers and Tropicrop."

For Claim No HCV 04099 of 2008 he stated:

> "● Based on the evidence:
>
> ◦ Tropicrop had a gate consistently in place
>
> ◦ The evidence of the farmers point to them using the road based on their being allowed to farm on Abbey Green by previous and current owners.
>
> ◦ Two farmers are on Radnor..."

[25] Having made a determination on the factual issues, the learned judge turned his attention to the legal issues, commencing with the jurisdiction of the parish council in relation to the reserved road. In paragraph [53], he gave the following analysis and conclusion with regard to the jurisdiction of the parish council.

> "● Application made and approval given in accordance with Local Improvements Act.
>
> ● Said reserved road appears to have 'doubled' as the boundary between the lots on the application for subdivision to the Parish Council.
>
> ● Irrespective of whether the road is private or public, it would appear that the road falls within the jurisdiction of the Parish Council based on its inclusion in the subdivision plan and the subsequent approval granted for it.
>
> ● Proposition - while the road was used for private purpose, it now became part of a public record by virtue of its submission on the survey plan.
>
> ● No formal application made for it to be private.
>
> ● Would not be on the record for the Parish Council Roads as it has not met the specifications of the Parish Council and submitted accordingly."

[26] After assessing the evidence in relation to the easement, in paragraph [57], the learned judge stated that all the witnesses had given similar evidence in respect of a gate and the fact that the use of the road was based on permission. In evaluation of the evidence with regard to the issue of adverse possession, the Prescription Act and the Limitations of Actions Act, the learned judge found that it was a difficult proposition for the farmers at Abbey Green to pass the test of intention to possess as established in **Powell v McFarlane** (1977) 38 P & CR 452 and **J A Pye (Oxford) Ltd and Another v Graham and Another** [2002] UKHL 30. There was, he said, no action by the farmers to occupy or own the lands to the exclusion of the respondents. Further, their use of the land was concurrent with that of the respondents, since they used the land for agricultural purposes, and also planted similar crops to that of the respondents. With regard to whether the farmers had established adverse possession to part of the lands, the learned judge stated that although the boundaries had been established and identified to the surveyor, Mr Richard Stewart, the farmers' partial use of the land, that is the 15 acres out of a total of 334 acres, where boundaries were not in dispute, did not serve to oust the possession of the respondents. The judge found, in reliance on the cases of **West Bank Estates Ltd v Arthur and Others** [1967] 1 AC 665 and **Higgs and Another v Nassauvian Ltd** [1975] 1 ALL ER 95, that the mere farming by the applicant farmers, without more, was insufficient evidence of adverse possession. Finally, he made findings on the issues that he had identified as set out in paragraph [3] herein.

[27] The notice and grounds of appeal were filed on 9 January 2009. It is a rather unwieldy document. There are many grounds, including that the learned judge erred:

(i) in failing to find that the reserved road was a parochial road and fell under the jurisdiction of the parish council;

(ii) in ruling that none of the farmers had established that they had acquired the lands on which they had been farming for a period in excess of 13 years;

(iii) in ousting the jurisdiction of the parish council who had the proper authority to grant subdivision approval;

(iv) in failing to accept the evidence of the farmers and the parish council with regard to access by the public to the reserved road prior to the erection of the iron gate by Tropicrop;

(v) by failing to accept the evidence of Alfred Edwards and others of their exclusive occupation and control of the lands farmed by them for a period exceeding 12 years before purchase of the land by the respondents;

(vi) in misinterpreting certain aspects of the evidence given by the farmers, such as Mr Alfred Edwards,

Councillor Deverell Dwyer and Mr Clinton Gordon, particularly with regard to, but not limited to the period of time spent by the farmers on the lands being claimed by the respondents in respect of their claim for adverse possession; and the fact that the subject road was part of the subdivision approval granted by the parish council and which therefore gave the council the right to determine the access to the subject road;

(vii) in that the judgment read by Simmons J on 8 November 2017, was different from the judgment signed by King J, as whereas the former granted access to the reserved road, the latter did not, which substantial changes were impermissible. Additionally, the judgment was handed down seven years after the matter was heard, resulting in an unfair trial and breach of the applicants' constitutional rights.

(viii) in his recollection of and the importance of the evidence of Mr Richard Stewart, especially as the evidence was unchallenged, and particularly with regard to the fact that the parish council would have jurisdiction over the reserved road, and also in

ultimately finding that the road was a private road which meant that Mr Stewart's evidence had been ignored; and

(ix) in failing to accept the evidence of Mr Blindford Rodrick McDonald, a farmer and father of the 7th applicant, and Mr Ian Harriott, the 2nd applicant, Mr Patrick Paterson, the 5th applicant and Mr Bromley Edwards, all farmers of advanced age and very familiar with the subject lands having farmed there for several decades.

Analysis and Decision

[28] This court has in many cases indicated the proper approach which ought to be adopted when deciding whether a stay of execution ought to be granted pending the determination of an appeal.

[29] In **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30, at paragraph [48], a single judge of this court encapsulated the principles thus:

> "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 (rule 2.11(1)(b) of the Court of Appeal Rules (CAR)). An appeal however does not operate as a stay of execution of the decision in the court below, unless so ordered by the court below, or this court or a single judge of this court (rule 2.14(a) of CAR). The traditional approach to the grant of a stay of execution was established in **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887,

which was a two-fold test which required the applicant to demonstrate that: (i) he had some prospect of succeeding in his appeal; and (ii) without the stay he would be financially ruined. However in recent times, a more liberal approach has been adopted: see **Watersports Enterprises Ltd v Jamaica Grande Limited and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, Application No 159/2008, judgment delivered 4 February 2009; **Reliant Enterprise Communications Limited and Another v Infochannel Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/2009, Application Nos 144/ 2009 and 181/2009, judgment delivered 2 December 2009; and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1. In **Paymaster V GKRS**, Harris JA observed that the court's approach now is to "seek to impose the interests of justice as an essential factor in ordering or refusing a stay". Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA 2164 stated the following as the proper approach:

> '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.'

It is necessary therefore in deciding whether to grant or refuse a stay that I must consider whether there is some merit in the applicant's appeal and whether the granting of a stay is the order that is likely to produce less injustice between the parties."

[30] As a consequence, I am obliged to consider the likelihood of success on appeal and the risk of injustice.

The likelihood of success on appeal

[31] Counsel for the 1st respondent, Miss Maliaca Wong, in submitting that the decision of the trial judge in refusing the farmers' claim for adverse possession and prescriptive rights was well reasoned, stated that the judgment included an assessment of the credibility of the witnesses for the applicants. Counsel asserted that the authorities have settled the principle that the Court of Appeal does not generally disturb the trial judge's findings of fact unless the same were so perverse, which, she stated, was not so in the instant case. Counsel referred to and relied on the well-known and oft-cited case of **Watt (or Thomas) v Thomas** [1947] AC 484 for that position. I accept readily the principles stated in **Watt v Thomas**, and can understand why counsel would have relied on that authority, as there are several matters and issues of fact that the learned judge has found in favour of the respondents. When the sole issue in a case turns on whom the trial judge believes, that decision is likely to be very difficult to overturn on appeal. This statement of the law has recently been underscored by the Judicial Committee of the Privy Council in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21.

[32] However, in this case, there are other findings and relevant matters not solely related to credibility issues. I will only mention a few of them for reference and convenience. In paragraph [53] of the judgment (set out in paragraph [25] herein), the learned judge appeared to conclude that the reserved road was a parochial road, and

not a private one, which would suggest that the parish council would have suzerainty over it. This therefore raised the question of the true and proper interpretation to be given to condition numbered 2 on the subdivision approval granted by the parish council, in keeping with its resolution of 11 April 1989, namely, that the means of access to the lots shall be to the satisfaction of the parish council and/or the public works department, and also the true meaning of the subsequent resolution of the parish council dated 8 May 2008. The parish council certainly seemed to have contended at the trial what means of access to the lots would have been satisfactory to it. Additionally, the questions which must arise are as follows- did the parish council intend that the alignment of the reserve road was to provide easy access to the lots created in the subdivision, to the Crown lands, and other adjoining lands, and was not to be the private preserve of anyone or any particular group? Was that resolution effectual? What was the true interpretation to be accorded the resolutions against the background of the relevant statutory instruments governing roads in the parish?

[33] The finding, however, that the road was a parochial road, was inconsistent with the ultimate finding of the learned judge in paragraph [87] of the judgment, where he stated categorically that the reserve road was a private one. This will pose a basis for discussion on appeal, particularly in the light of the claim by the applicants, that the judgment, which was initially read by Simmons J on 8 November 2017, granted access to the farmers, while the judgment of King J, published subsequently, had not done so. On the face of it, this poses an argument on appeal, with some chance of success.

[34] There is also the issue as to why no order for possession was made on the counterclaim by Tropicrop in Claim No HCV 04099 of 2008 in respect of the lands contained in the certificates of title registered at Volume 1322 Folio 20 and Volume 1034 Folio 50, respectively. This is especially curious, if, on the face of the documentation, it is to be accepted that the defence and counterclaim was filed, as it has the Supreme Court file and date stamp on it, and also the received date stamp from Messrs Jarrett and Company, the attorneys representing the farmers. Mr Jarrett communicated to this court, by way of letter dated 21 February 2018, that he knew nothing about the defence and counterclaim of Tropicrop, and objected to that document being placed before me in the pleading bundle that I had requested. I reviewed the same however, as the stamps mentioned were impressed on the document, leaving the issue as to its alleged efficacy, in my view, for another day. Although there was no defence filed to the counterclaim, the court surprisingly had made no order on it for possession, as claimed. Was this just an omission of the learned judge as he had rejected the arguments of the farmers to claims of ownership of the lands by way of adverse possession, and so thought it unnecessary? Or was there some other reason for this omission in the orders which could have negative consequences to the implementation of the judgment, and therefore the basis for further argument on, and the outcome of, the appeal?

[35] The applicants have also claimed that King J, not having given a decision on the claim for a period of over seven years, against the background of a claim that he had misunderstood and misrepresented the evidence, and which had resulted in an unfair

trial, is a claim, which in my view, is not without some merit. Although I am not willing to comment on the grounds that specifically address that aspect (that is, the misunderstanding of the evidence as already outlined), nonetheless when one is challenging a judgment on the basis that the court had made findings of facts based on the credibility of the witnesses, then the delay, if it can be considered inordinate, may have some impact on the review by this court of the conclusions arrived at by the learned judge, as his advantage of having seen the demeanour of, or having heard the witnesses, may have been lost under the umbrella of extraordinary delay. The real issue which would have to be considered on appeal, is whether the trial was fair in those circumstances? That would be a matter for the Court of Appeal, and in my opinion, such a ground of appeal could have some chance of success, depending on what an assessment of the detailed evidence disclosed in the transcript. Additionally, and of even more significance is the issue of whether the learned judge had the authority to give his decision several years after his retirement, given the provisions of the Constitution. This is a very real issue and one that is currently before this court for a decision in another matter on appeal already argued by senior Queen's Counsel, and which has been adjourned by the court *cur adv vult.* As a result, in the light of all of the above, the applicants would have crossed the first hurdle identified by the authorities, that is, whether there was the likelihood of success on appeal.

The risk of injustice/the interests of justice

[36] Mr Jarrett has indicated that when considering whether to grant or refuse a stay of execution of a judgment, the court must consider all the circumstances of the case,

and an essential fact in that consideration is the risk of injustice. He submitted that the farmers, (70 of them) claim that the denial of access to their respective farms by way of the reserve road, wreaks great injustice to them. He maintained that the entire community was in jeopardy. The blocking of the road, he stated, would have a disastrous affect on their livelihood.

[37] In opposition the respondents stated, through counsel, that the successful party should not be denied the fruits of its judgment. In keeping with the dictum of Clarke LJ in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, counsel argued that the court must adopt a balancing exercise within the context of the interests of justice. The essential question when considering the risk of injustice, it was submitted, was that, if the stay was refused, would the appeal be stifled, and if the stay was granted, what was the risk of the respondents being able to enforce their judgment if they were successful on appeal? But the first hurdle must always be, were the applicants likely to have any prospect of success on appeal? If that hurdle has been crossed, (and as indicated, in my view, it has been), the respondents contended that in the instant case, enforcement by them of the judgment of King J would not stifle the appeal. The farmers, counsel submitted, were seeking by order on appeal, ownership of land by virtue of adverse possession, and prescriptive rights over a road on land registered to the respondents. The parish council was maintaining that they had jurisdiction over the disputed land and were seeking a declaration in that regard.

[38] Counsel for the 1st respondents, submitted that the farmers did not live on the disputed land. They were farming on a part of the land. Counsel further submitted that if the farmers succeeded on appeal they could resume the farming and replanting of their crops. In the interim, they could plant on other lands, and some had already done so. Also, counsel submitted, no public rights were affected, save the use of the subject road, to lands which the farmers claim by way of adverse possession, but which are registered in the name of the respondents.

[39] If the stay was refused, counsel submitted, the applicants' appeal would not be rendered nugatory, as they could proceed to farm elsewhere, and in any event, any losses can be paid by the respondents. On the other hand, the farmers' access to their lands by way of the subject reserve road through the respondents' lands opens the respondents to losses through praedial larceny, which the applicants are unable to pay. Additionally, the maintenance of the gate, through security and the payment of additional staff, was onerous. This was particularly so, the respondents submitted, in circumstances where the lands the farmers are claiming, they know they do not own, and have only been permitted to use by way of employment through the respondents' predecessors in title.

[40] In my view, it is of significance, that the respondents' claim that the farmers can farm elsewhere, as they would not therefore be deprived of a livelihood, and it is also significant that they claim that the farmers, not having access to their farms through the reserve road, will also not have any adverse negative effect on them, as the

respondents further contend, that the farmers have an alternate parochial road which they can utilise namely road 205, which is an offshoot of the reserve road.

[41] The submissions of Mossmans were in similar vein. Counsel said there was no question of a community in distress, as there were only four farmers who were still farming the subject lands and using the reserve road to get to their farms, and so the appeal really only related to them.

[42] It can sometimes be extremely difficult when considering whether to grant a stay of execution pending appeal, to effect the balancing exercise, as stated in the authorities, against the background of competing rights and the interests of justice, whilst endeavouring to ensure the least irremediable harm to the litigants. However, having considered the extensive submissions made, the affidavits before me, and additional documentation, I have decided that the greater harm may be to the farmers who have been utilising their respective farms, and have had access to the same by way of the reserve road since at least 12 August 2008, from the order of Brooks J, up and until November 2017, when the order of King J was given.

[43] As I have indicated, there are important issues on appeal with some prospect of success. It therefore does not seem to me to be in the interests of justice to refuse the farmers access to their produce which has been grown over the period, in circumstances where the appeal may be heard in the Michaelmas term, some six to eight months away, and determined thereafter, although one would not now know what the outcome of the appeal would be. So, although there may be some access

through road 205, I think it must be a more reasonable approach to obtain an early hearing date for the appeal, and endeavour to restrict the farmers' access to their farms through the gate and on the reserve road in the interim period until the determination of the appeal. A similar approach had been taken by Brooks J in 2008. I would therefore restrict access between certain hours, and in respect of named the farmers in an effort to contain the potential loss by praedial larceny, if that is a real possibility, and/or any other losses and expenses in respect of the maintenance of the reserve road and/or the iron gate erected thereon. I would suggest that a case management conference be held at the earliest possible opportunity.

[44] I therefore made the orders set out below on 16 February 2018, and promised reasons for the same, which are encapsulated herein. The orders made were:

ORDER

1. There shall by a stay of execution of King J's judgment delivered 8 November 2017, pending the determination of the appeal and the counter notice of appeal (no 112/2017) on the following terms:

    (i) The respondents are restrained from preventing access by the applicants (the 50 named farmers referred to in the amended claim form HCV 04099 of 2008), to the reserved parochial road, the subject of this appeal, to their respective farms in the parish of Saint Thomas.

(ii) A list of the 50 named farmers referred to in the amended claim form HCV 04099 of 2008 shall be provided to the respondents within 14 days of the date of this order.

(iii) The Saint Thomas Parish Council is restrained by itself, its servants or agents from removing the respondents' iron gate erected on the respondents' lands at Abbey Green Estate in the parish of Saint Thomas.

(iv) The respondents shall allow access through the said iron gate each week from Monday to Friday, between 6am to 6pm, to the 50 farmers named on the list provided.

2. A case management conference for directions in respect of the hearing date and the conduct of the appeal should be held between the parties at the earliest possible date.

3. Costs of this application to be costs in the appeal.