[2020] JMCA App 40

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2020APP00058

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

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

Miss Janene Laing for the applicant

Jerome Spencer instructed by Mrs Charmaine Smith Bonia for the respondents

23 June, 31 July and 25 September 2020

MCDONALD-BISHOP JA

[1] I have read the draft reasons for judgment of my sister, Foster-Pusey JA, and they accord with my reasons for concurring in the decision of the court. I would only add, by way of comment, that it would not be in the interests of justice to deprive the applicant of the judgment of the court that he has held in his hands, as something of value, for the past three years.

[2] There was nothing before the court which suggested a reasonable basis for contending, at the hearing of the appeal, that the Parish Court Judge was plainly wrong in coming to her decision. There was nothing to show that it was just and convenient for an injunction to be granted. In such circumstances, justice demanded that the post-trial status quo should have remained unless or until this court is placed in a position to properly hold that there is a juridical basis to deprive the respondent, even temporarily, of the fruits of the judgment that he has been acting upon for the past three years. The delay in the prosecution of the appeal, which is not the fault of the applicant, ought not to prejudice his interest in his property as the registered proprietor or to otherwise operate to his detriment.

[3] At the same time, I would also endorse the views and recommendation of my sister expressed at paragraph [72] below. The position in which the respondents have been placed, in seeking to prosecute their appeal, is unfortunate and untenable. There is no doubt that they are being prejudiced by the undue delay. I can only hope that every effort be made by the Portland Parish Court, in collaboration with counsel for the parties (in so far as they are able to assist), to have the relevant documentation transmitted to the registrar of this court for the appeal to proceed without further delay. The state of affairs is regretted.

SINCLAIR-HAYNES JA

[4] I too have read the draft reasons for judgment of my sister, Foster-Pusey JA and I agree with her reasoning and conclusion.

FOSTER-PUSEY JA

[5] This is an application brought by Earl Jackson ("the applicant"), to vary and/or discharge the orders of a single judge of this court ("the single judge") made on 5 March 2020 as well as to adduce fresh evidence. The respondents, Mr Carlton Coakley and Mrs Michelle Coakley, on 19 March 2020 filed an application in this court for a stay of execution of the judgment of Her Honour Miss M Moyston, Parish Court Judge for the parish of Portland ("the parish court judge") made on 20 February 2017. They also sought a reinstatement of the interlocutory injunction made on 29 March 2010 and modified on 17 May 2010 by the said Parish Court Judge.

[6] On 11 and 18 February 2020, the single judge heard submissions and evidence by both counsel. On 5 March 2020, she ruled in favour of the respondents and made the following orders:

> "(1) Stay of execution is granted pending appeal.
>
> (2) Upon [the respondents] having given the usual undertaking as to damages an injunction pending the appeal is granted in favour of [the respondents] in the following terms:
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> (i) [The applicant] is to allow [the respondents] to use the roadway and the pedestrian side of the gate whenever they are in Jamaica;
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> (ii) [The applicant] is to provide [the respondents] with a key for the gates, for their exclusive use;

(iii) [The respondents] are to bear the cost of obtaining the keys.

(3) No order as to costs."

[7] On 23 June 2020, we heard the application to vary or discharge those orders. At the commencement of the hearing, counsel for the applicant indicated that she would no longer pursue the application to adduce fresh evidence. We reserved our decision at the end of the hearing and promised to give our decision and reasons in the shortest possible time. Being mindful of the urgent nature of the matter, although the written reasons were not yet ready, on 31 July 2020, we announced our decision and made the following orders:

"1. The orders of Simmons JA (Ag) made on 5 March 2020 granting a stay of execution of the parish court judge's orders made on 20 February 2017 are discharged.

2. The orders of Simmons JA (Ag) made on 5 March 2020 granting an injunction are discharged.

3. Costs to the applicant for the application before the judge as well as the costs of the application to discharge the orders made."

We indicated that the reasons would follow and now provide same.

Background

[8] The applicant is the owner of property located in the parish of Portland registered at volume 1039 and folio 579 of the Register Book of Titles. The respondents, who are husband and wife, are joint owners of property also located in the parish of Portland and registered at volume 1322 and folio 404 of the Register Book of Titles. The parties are neighbours and have had a long-standing dispute over a roadway located on the

applicant's property which can also provide access to the respondents' property. The respondents allege that in July 2009, the applicant built a gate on his property preventing them from using the disputed roadway to access their property. As a consequence, in 2009, they instituted proceedings against the applicant in the Portland Parish Court. The respondents sought the following reliefs, among other things, in the amended particulars of claim included in the record of appeal:

> "i. damages for trespass of easement; and
>
> ii. an injunction that the gate leading to [sic] access road be removed."

[9] In the amended particulars of claim, the respondents pleaded that they had purchased their property in 1988 and at that time, they had a right of way which they initially utilised. The disputed roadway, which is on the applicant's land, intersects with the Boundbrook main road. However, the respondents claimed that they had been using the disputed roadway to enter their property continuously, unmolested and undisturbed for 21 years. They claimed that they had, as a result, acquired an easement by implication over the roadway. Alternatively, the respondents claimed that they had acquired an easement by acquiescence, pursuant to section 45 of the Limitations of Actions Act, in light of their use of the roadway for a period in excess of seven years.

[10] On 29 March 2010, the Parish Court Judge granted an injunction in favour of the respondents allowing them access to the disputed roadway until trial. This injunction was subsequently modified on 17 May 2010 and remained in place until 20 February 2017, when the Parish Court Judge granted judgment for the applicant and discharged it.

[11] On 9 March 2017, the respondents appealed the decision of the Parish Court Judge on the ground that she erred when she found that they had not acquired an easement over the applicant's property "whether by way of mistake, prescription, necessity and or by the respondents' registered title".

[12] Approximately three years after the filing of the appeal, the respondents, on 3 January 2020, by way of a notice of application for court orders, sought a stay of execution and an injunction in this court pending the determination of the appeal. The salient grounds of their application were:

> "...
>
> e. The stay is necessary to preserve the status quo and [the Respondents'] interest therein pending the determination of the appeal.
>
> f. That whilst [the Respondents] have and will continue to suffer irreparable harm, prejudice and loss if the stay of execution is refused, [the Applicant] will suffer none should the execution of this Judgment be stayed pending the Appeal of this matter.
>
> g. [The Respondents] will undertake to abide by any orders this Honourable Court may make to damages.
>
> h. That the interest and administration of justice will not be compromised by the stay of the Judgment pending the determination of the Appeal.
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> i. Damages are not an adequate remedy for [the Respondents] based upon the circumstances of the case.
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> j. [The respondents] believe that they have a real prospect of success on Appeal and it is in the interest of justice that [the Respondents] be allowed to have the Judgment of the Parish Court stayed and the

> Interlocutory Injunction reinstated until this Honourable Court determines the Appeal."

[13] The application was supported by an affidavit of urgency of Charmaine Smith Bonia and an affidavit of Carlton Coakley and Michelle Coakley, both filed on 3 January 2020. In opposition of the application, the applicant filed an affidavit on 13 January 2020. The 2nd respondent thereafter filed an affidavit in response on 5 February 2020. The applicant filed a further affidavit on 10 February 2020 along with an affidavit from Courtney Kerr.

[14] On 7 January 2020, Edwards JA, sitting as a single judge, granted an interim stay of the orders of the Parish Court Judge. A date for the inter partes hearing was set for 14 January 2020. On 14 January 2020, the hearing did not proceed. The interim stay was lifted and the inter partes hearing was scheduled for 11 February 2020.

The single judge heard the inter partes application on 11 and 18 February 2020 and on 5 March 2020, she granted a stay of execution and an injunction in favour of the respondents. Aggrieved by the decision of the single judge, the applicant, on 19 March 2020, filed an application to vary and/or discharge the judge's orders and also to adduce fresh evidence.

The application

[15] The applicant sought the following orders:

> "1. That the orders of the Honourable Ms. Justice Simmons made on the 5th day of March 2020 in Application No. 00001 of 2020 be discharged and/or varied;
>
> 2. That the Stay of execution granted on March 5, 2020 be varied and/or discharged;

3. That the injunction granted on March 5, 2020 be varied and/or discharged;

4. That this Court grant the Applicant leave to adduce fresh evidence; [This was abandoned]

5. Costs to be costs in the Appeal; and

6. Such other Orders or reliefs as this Honourable Court deems just."

[16] The grounds on which the applicant relied were as follows:

"1. Court of Appeal Rule ('CAR') 2.11(2) provides that any order made by a single judge may be varied or discharged by the Court;

2. The Learned Court of Appeal judge erred by granting the Respondent[s'] application for stay of execution in circumstances where:

(a) The Application was misconceived since the Respondent[s] [do] not have a realistic prospect of success on appeal;

(b) There was no risk of irremediable harm to the Respondent[s];

(c) There was risk of irremediable harm to the Applicant and the grant of the stay was more likely to produce more injustice to the applicant than if it were refused; and

(d) The order did not balance the interest of the respective parties.

3. The Learned Court of Appeal Judge erred in granting a stay when the Respondent[s'] application for the stay and injunction was made three years after the Notice of Appeal was filed, which demonstrates that there was no serious hardship to the Respondents and the Respondents did not proffer reasonable reasons for the significant delay in applying.

4. The learned single Judge erred in granting a stay by failing to consider that the Respondents failed to apply for a stay from the parish Court Judge in the court below at the time of the judgment.

5. The Learned Court of Appeal Judge erred in granting the Respondent[s'] application for injunction where the balance of convenience did not favour the Respondent[s] and damages would not be an adequate remedy for the Applicant.

6. The learned Court of Appeal Judge erred in granting what is tantamount to an indefinite injunction and stay where there is no date scheduled for the hearing of the appeal and the learned Court of Appeal Judge had notice during the hearing of the application, in addition to the evidence before [sic] in the application that:

    (a) There were no available reasons for the decision of the Parish Court Judge up to the date of the order;

    (b) There were no available notes of evidence of the Parish Court Judge up to the date of the order and such notes of evidence may continue to be unavailable;

    (c) The Parish Court Judge is now in retirement and may not be in a position to furnish reasons; and

    (d) The possibility that the notes of evidence and/or reasons for decision may never be forthcoming, which will affect the ability of the Registrar of this Honourable Court to set a date for appeal.

7. The learned Court of Appeal Judge erred in finding that there was merit to the Respondent[s'] appeal concerning easement by prescription when the evidence before her and the law did not support such a finding.

8. The learned single Judge of Appeal erred in granting the Respondents pedestrian access which is inconsistent with the facts which were before her since the Respondents had two alternate pedestrian accesses to their property.

9. The learned single Judge of Appeal erred in granting the stay and injunction which was inconsistent with the evidence before her concerning the Respondents' fresh application for a right of way for another unrelated area of land in the year 2000.

10. The single Judge of Appeal erred in granting the stay and injunction which was inconsistent with the evidence before her that the Respondents had an existing registered right of way which they took no steps to enforce or use.

11. The Applicant kindly reserves the right to amend these grounds once it is in receipt of the reasons for the learned Court of Appeal Judge.

12. The learned single Judge erred in law and her ruling was based on a misapplication of the facts and therefore this Honourable Court may set aside her orders.

13. The Applicants request leave to adduce fresh evidence since certain documents were not in his possession at the time of the application and such documents are germane to the issues to be determined. [This ground was abandoned]

14. It is in the interests of fairness and justice for this Honourable Court to make the aforementioned orders."

[17] The application was supported by the affidavit of Earl Jackson filed on 19 March 2020. He also relied on affidavits filed on 13 January 2020 and 10 February 2020. The

applicant deposed that the orders made by the single judge are significantly prejudicial to him and his interest in his land. He stated that the trial in the Parish Court took approximately seven years, at the end of which the Parish Court Judge found in his favour. He claimed that the effect of the orders of the single judge is to deprive him of the fruits of his judgment which he had been enjoying since 2017, and allowing the respondents to have access to his land where they have no legitimate claim to do so. He stated that importantly, there is no evidence to support the claim that the respondents had acquired a prescriptive easement.

[18] As regards the injunction, the applicant deposed that he will be significantly prejudiced as there is no date set for the hearing of the appeal. He referred to the affidavits of the respondents in which they have stated that the notes of evidence and reasons for judgment are not available. In addition, it appears that the Parish Court Judge who heard the matter has retired. He stated that the effect of the injunction which was granted is that the respondents will be accessing his land for an indefinite period of time. This was a matter of concern since the relationship with the respondents is not a good one.

[19] The respondents did not file affidavits in response to this application. Instead they relied on the affidavits which they had filed in support of their application for the stay of execution and injunction in January and February 2020. In these affidavits, the respondents deposed that they had been using the roadway for over 21 years and as such an easement had been created giving them the right to continue to use the roadway. They stated that, in light of the decision made by the Parish Court Judge, they were

experiencing hardship as they were being forced to use an old train track to access their property. This was dangerous to their health and safety, considering that they are elderly.

Issues

[20] I have distilled the following issues which were critical for this court's consideration in dealing with the application:

Stay of execution -

(a) whether the parish court judge's decision was amenable to a stay of execution;

Injunction –

(b) whether the judge erred in finding that the respondents have a good arguable appeal or a reasonable ground of appeal;

(c) whether the judge correctly found in the circumstances of the case that the balance of convenience lies in favour of the respondents; and

(d) whether the judge, in considering whether to grant the injunction erred when she failed to consider the respondents' three-year delay before they applied to the court for relief.

[21] In so far as our review of the single judge's decision is concerned, it should be noted that if we believe that the single judge erred in finding that there was a good arguable ground of appeal, it would not be necessary to consider the remaining issues.

Submissions

Applicant's submissions

a. Stay of execution

[22] Ms Laing, counsel who appeared on behalf of the applicant, submitted that by virtue of rule 2.11(2) of the Court of Appeal Rules ("CAR"), this court is entitled to vary and/or discharge the orders of the single judge. She acknowledged that the single judge was entitled to exercise her unfettered discretion in granting the stay of execution in favour of the respondents. However, she noted that this court has the jurisdiction to review the decision of the single judge so as to ascertain whether she misconceived the facts, misapplied the law or there was some change in the circumstances to show that the decision was plainly wrong (see **Hadmor Productions Limited and others v Hamilton and Another** [1983] AC 191 and **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30).

[23] Counsel addressed the question as to whether the respondents' appeal had merit and where the risk of injustice lay. She outlined the relevant principles governing a stay of execution. She argued that the single judge erred in finding that there was merit in the respondents' appeal and that they would face the greater risk of injustice if the stay was refused. The crux of counsel's argument was that there was no evidence before the court supporting these findings (see **Paymaster (Jamaica) Limited v Grace Kennedy**

Remittance Service Limited and Anor [2017] UKPC 40). I must thank counsel for her industry in respect of her submissions dealing with these principles. However, I believe that the central issue is whether the Parish Court Judge's orders were amenable to a stay.

[24] Turning to the question as to whether the decision of the Parish Court Judge was amenable to a stay of execution, counsel contended that this court has the jurisdiction to intervene because the single judge erred in law and fact when she granted the stay of execution. She submitted that the Parish Court Judge granted judgment for the applicant, and the interlocutory injunction, which was imposed on 29 March 2010, and modified on 17 May 2010, was discharged. Therefore, the Parish Court Judge did not require the respondents to act in any particular way such as to pay damages or to refrain from interfering with the applicant's rights. Reliance was placed on **Kenneth Boswell v Selnor Developments Limited**, which has made it clear that there are some orders which are not amenable to a stay of execution and a stay may only be granted where some action is required to be taken. Counsel highlighted that the only order that could have been stayed was the order for costs. However, what the respondents sought to have stayed related to the matter of access to the property.

b. Injunction

[25] Counsel submitted that, in light of the circumstances of the case, the single judge erred as it was not just and equitable for her to have granted the injunction. Therefore, guided by the principles in **Hadmor Productions Limited and others**, this court can disturb the single judge's exercise of discretion.

[26] Commencing at paragraph [63] of her judgment, the single judge analysed whether there was a serious issue to be tried. At paragraph [64], she accurately stated the principles in the **American Cyanamid** case and concluded at paragraph [65] that, having found that the appeal is not completely devoid of any prospect of success, it was her view that there is a serious issue to be tried.

[27] This approach, counsel argued, was not in line with that established in the **American Cyanamid** case. Counsel highlighted that in considering whether to grant the stay of execution, the single judge concluded that the appeal was not devoid of success. She then used this finding to also establish that there was a real prospect of success in relation to the application for an injunction.

[28] Counsel also pointed out that, according to American **Cyanamid,** it is not a part of the court's function to resolve conflicts of evidence at this stage. However, the single judge erred in law as she attempted to resolve conflicts on the affidavit evidence of the parties.

[29] Moving to the issue of the balance of convenience, counsel submitted that the primary objective of the court is to preserve the status quo of the parties until the full hearing of the matter. This therefore requires an examination of the relative strength of each party's case and weighing the damage that would be caused to either party were the injunction to be granted or refused (see **National Commercial Bank v Olint Corporation Limited** [2009] UKPC 16).

[30] Counsel contended that the single judge erred, as she failed to properly consider where the balance of convenience lay among the parties. She highlighted that the judge failed to take into account:

a. that the applicant had been seized of a judgment for three years;

b. the applicant's capacity as a registered title owner;

c. the uncertainty of the duration of the injunction due to the unavailability of the notes of evidence and reasons for judgment from the parish court;

d. that the respondents were not entirely deprived of access to their property; and

e. that damages would also not be an adequate remedy for the applicant as the subject matter in dispute among them is land (see **Lookahead Investors Limited v Mid Island Feeds (2008) Limited** [2012] JMCA App 11).

[31] Counsel then raised the matter of delay by the respondents. She submitted that although the single judge, at paragraph [70] of her judgment, acknowledged that the case was of some vintage, she failed to take into account, in considering whether to grant

the injunction to the respondents, the critical issue of their delay in making the application. Counsel argued that delay defeats equity and therefore the respondents' delay of three years, in instituting the application, militated against the single judge exercising her discretion in their favour. The respondents had not demonstrated that over the three years since the ruling by the Parish Court Judge, they had suffered harm by using the old train track. The delay, therefore, did not suggest that there was a need for immediate redress.

[32] Counsel further submitted that the respondents did not provide the court with any legitimate reasons for this significant delay. The excuse proffered about the unavailability of the notes of evidence and reasons for judgment was not reasonable as they are still not available and the application was heard without them.

Respondents' submissions

a. Stay of execution

[33] Counsel for the respondents, Mr Spencer, agreed that, pursuant to rule 2.11(2) of the CAR, this court has the power to discharge and/or vary the orders of a single judge. He referred to and relied on the case of **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44 at paragraph [48], where Phillips JA pointed out that a single judge's order will only be set aside if it is demonstrated that the judge misunderstood or misapplied the law or misconceived the facts and therefore can be shown to be 'demonstrably wrong'.

[34] While counsel had taken a different position in his written submissions, in his oral submissions, he conceded that there was nothing for the single judge to have stayed, as the only order amenable to a stay was the order for costs. He instead emphasised that the real issue before the court was whether the injunction ought to have been granted.

b. Injunction

[35] Counsel submitted that rule 2.11(1)(c) of the CAR confers power on a single judge to grant an injunction and outlined the well-known principles to consider in granting an injunction. He relied on the case of **Epsilon Global Equities Limited v Paul Hoo and others** [2011] JMCA App 24, per Harris JA at paragraphs [13] – [15].

[36] Counsel submitted that the single judge accurately found that there is a serious issue to be tried as to whether the respondents had acquired an easement by prescription over the disputed roadway. The evidence before the court was that the respondents had been, without objection, using the disputed roadway to access their property for approximately 21 years. This, counsel submitted, is a good and arguable case.

[37] Mr Spencer further submitted that the single judge was concerned about the restriction on the applicant's use of his registered land. However, this court should consider the very strong ground of appeal concerning easement by estoppel. Importantly, counsel indicated that section 158 of the Registration of Titles Act ("RTA") gives the court vast powers in proceedings, law or equity, to curtail the interest of a registered proprietor.

[38] As regards the balance of convenience, counsel submitted that the single judge correctly found that the respondents were the ones who would suffer greater prejudice

if some form of interim restraint was not put in place pending the determination of the appeal. The single judge, counsel submitted, properly considered that the respondents are elderly and the only other actual means of accessing their property is by foot through the old train line, which poses safety and security risks.

[39] Counsel pointed out that the respondents do not deny that they have a registered right of way, however it was impracticable to use that right of way as it is obstructed by the Browns' house. Counsel also submitted that the fact that the respondents built a wall blocking their registered right of way is a "red herring" because "that wall is at the back of the property owned by Mr. Renford and Ms. Brown and for them to even get to that wall, they have to go through the property owned by Mr. Renford and Ms. Brown, which itself has a wall".

[40] On the point of the adequacy of damages, counsel noted that the single judge's approach was in keeping with the relevant authorities. The single judge, according to counsel, accurately found that an award of damages would not have been an adequate remedy for the respondents and that their undertaking of damages was sufficient.

[41] Turning to the matter of delay by the respondents, counsel contended that the applicant did not raise the issue of delay in any of the affidavits filed or before the single judge requiring her consideration. This is also evident in the reasons of the single judge and such failure to address the issue of delay is not sufficient to invalidate the exercise of her discretion.

Analysis

[42] By virtue of rule 2.11(2) of the CAR, this court is empowered to vary and/or discharge the orders of a single judge. In the instant case, the single judge, in exercising her discretion, granted the respondents a stay of execution of the Parish Court Judge's judgment and an injunction allowing them access to the disputed roadway until the determination of the appeal. In **Kenneth Boswell v Selnor Developments Limited**, Phillips JA at paragraph [49] reminded us that:

> "… In making a determination as to whether to interfere with a learned judge's exercise of discretion, regard must be had to the principles stated by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, which have been endorsed in and applied by this court in numerous cases such as **The Attorney General v John Mackay** [2012] JMCA App 1. It is clear that in applying the principles gleaned from these cases, **this court can only interfere with the learned judge's exercise of his discretion if it can be shown that he misconceived the facts; misapplied the law or there was a change in the circumstances of the case sufficient to show that his exercise of discretion was plainly wrong**." (Emphasis added)

[43] The applicant has urged us to interfere with the exercise of the single judge's discretion on the basis that she erred in law and in fact when she granted the stay of execution and the injunction. At paragraph [20] herein, I had distilled several issues that were pertinent to resolving the matter at hand and I will now address them under the broad headings of stay of execution and injunction.

Stay of execution

[44] In the course of the submissions before us, it turned out that the core issue to be determined was whether the parish court judge's orders were amenable to a stay. Counsel for the applicant contended that the judge erred in granting the application for a stay of execution as there was nothing for the judge to stay.

[45] Counsel for the respondents conceded that, save for the question of costs, there was no order that was amenable for the judge to stay.

[46] In **Kenneth Boswell v Selnor Developments Limited**, Phillips JA noted at the following paragraphs:

> "[42] **Miss Russell accepted that there was no authority for me to grant a stay of execution in respect of any of the declaratory orders made. As a consequence she identified those orders that required some action to be taken, and requested a stay of the execution of those orders.**
>
> **Conclusion**
>
> [69] In my view, therefore, on the basis of all that I have said, if any of the specific questions posed or several of them could be answered in Mr Boswell's favour, in keeping with the evidence deposed by him in his affidavit, then there would seem to be an arguable case on the merits with real prospects of success on appeal. In all the circumstances also Mr Boswell does seem to be the party likely to suffer the most irremediable harm if the stay of execution is not granted, and I therefore do so pending the determination of the appeal. The orders I make are as follows:
>
> > **1. There shall be a stay of execution pending the determination of appeal no. 105/2016 of order nos 4, 12, 13, 14 and 15 of the judgment of K Anderson**

> **J made on 3 November 2016, namely**…" (Emphasis added)

In that case, I observed that Phillips JA stated, and counsel accepted, that only orders which require some action to be taken can be stayed. Consequently, in making the orders of the court, Phillips JA only granted a stay of execution of orders which required some action to be taken.

[47] The parties were agreed on the relevant law on this point as well as that the Parish Court Judge's decision did not require either party to take any action. As such, in my respectful view, the single judge erred in law in granting a stay of execution where it was inappropriate to do so. For this reason, I agreed that the stay of execution be discharged.

Injunction

Relevant principles

[48] In granting an injunction, a court must be guided by the principles enunciated in the locus classicus case of **American Cyanamid Co v Ethicon Ltd**. These principles were also adopted in the Privy Council case of **National Commercial Bank Jamaica Limited v Olint Corporation Limited**. In **David Tapper (Trading as 'Fyah Side Jerk and Bar') v Heneka Watkis-Porter (Trading as '10 Fyah Side')** [2016] JMCA Civ 11, Phillips JA usefully summarized these principles. She said:

> "[36] The principles gleaned from A**merican Cyanamid Co v Ethicon Ltd** and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** can be summarised as follows:
>
> > 1. The court must be satisfied that there is a serious issue to be tried, that is, that the claim is not frivolous or vexatious.

2. The court should then go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. In considering where the balance of convenience lies, the court must have regard to the following:

> (i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.
>
> (i) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.
>
> (ii) In deciding whether to withhold or grant the injunction the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.
>
> (iii) If the balance of convenience is even then the court should preserve the status quo."

[49] The **American Cyanamid** case highlights that consideration is to be given to whether there is a serious question to be tried. The principles outlined in that case, must,

however, be reviewed carefully when an injunction pending appeal is sought. This is because, unlike the situation in **American Cyanamid**, this is a matter in which the evidence had been given in open court before the Parish Court Judge at first instance, who saw and heard witnesses and made findings of fact, after full arguments were made before her, leading to a decision on the merits of the matter. At this level, therefore, the test is whether the respondents have a good arguable appeal or reasonable grounds of appeal. In this matter, which is highly fact based, the respondents, in order to succeed in their appeal, would have to persuade this court that it should interfere with the findings of fact made by the Parish Court Judge.

[50] The nature of the ground of appeal is relevant to an assessment as to whether it is a good arguable appeal, or there are reasonable grounds of appeal. In **Watt (or Thomas) v Thomas** [1947] AC 484, Viscount Simon said at page 486:

> "… **an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution.** If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, **but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight**. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge

> of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (Emphasis added)

[51] In **D & LH Services Limited and others v The Attorney General and the Commissioner of the Jamaica Fire Brigade** [2015] JMCA Civ 65, McDonald-Bishop JA, at paragraphs [30]- [33] of the judgment, highlighted the applicable principles where this court is being asked to disturb findings of fact made by a first instance judge. These include the following:

a. The appeal court must be satisfied that the judge at first instance has gone "plainly wrong". This directs the court to consider whether it was permissible for the judge to make the relevant findings of fact in the face of the evidence as a whole.

b. The court must identify a mistake in the judge's evaluation of the evidence that is so material that it undermines his conclusions.

c. The court will consider whether the judge failed to properly analyse the entirety of the evidence.

d. It is understood that the trial judge has had the benefit of assessing witnesses and actually hearing and considering the evidence as it emerges. Consequently,

> where a judge has arrived at a conclusion on the primary facts, only in rare cases will the appellate tribunal interfere with it. Such rare cases would include instances where there was no evidence to support a finding, there was a misunderstanding of the evidence or no reasonable judge could have arrived at that conclusion on the evidence before him.

[52] At paragraph [34] of the judgment, McDonald-Bishop JA stated:

> "The burden on the appellants in this case is, therefore, to persuade this court to the view that the findings of fact of the learned trial judge, on which she has based her decision to grant judgment in favour of the respondents, are such as to warrant the interference of this court."

[53] It stands to reason that these principles must be taken into account in an assessment as to whether the respondents have a good arguable appeal or reasonable grounds of appeal. In my view, if there is no reasonable ground of appeal or nothing to indicate that there is a reasonable ground of appeal, then no injunction should be granted pending the hearing of the appeal.

[54] At paragraph [64] of her judgment, the single judge referred to the principles governing the application for injunctive relief as outlined in **American Cyanamid Co**. At paragraph [65], she concluded that:

> "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."

[55] In arriving at this conclusion, the single judge appeared to have adopted her analysis and conclusion in the course of considering the application for a stay of execution, that "it cannot be said with any degree of certainty that their case is devoid of merit" (see paragraph [56] of the judgment). For the purposes of this review, although authorities of this court have indicated that the correct test is whether the respondents have a good arguable appeal or reasonable grounds of appeal, and not whether it is devoid of merit, I acknowledge the possibility that the single judge was using a different wording with a similar meaning. It is, however, best to use the test currently recognised for application in these matters. See paragraphs 37-38 in **Brilliant Investments Limited v Rory Chinn** [2020] JMCA App 6, in which the relevant test was discussed by reference to some earlier authorities from this court.

[56] The respondents' ground of appeal as outlined in their notice of appeal dated 9 March 2017 is:

> "That the learned Judge erred in law when she finds that [the respondents] have not acquired an easement over [the applicant's] property Registered at Volume 1039 Folio 579 whether by way of mistake, prescription, necessity and or by [the respondents'] registered title."

[57] The respondents have contended that they have been using the roadway undisturbed and unmolested for approximately 21 years pursuant to section 2 of the Prescription Act. In addition, they argued that since they were using the roadway for seven years, section 45 of the Limitation of Actions Act, which deals with acquiescence of reputed boundaries, is also applicable.

[58] The single ground of appeal filed by the respondents appears to be challenging the factual findings of the Parish Court Judge. At best, it could be seen as a ground of appeal which reflects mixed fact and law, but which substantially would involve more issues relating to the Parish Court Judge's findings of fact. It is appreciated, however, that the filing of this ground of appeal is premature as the law requires grounds of appeal to be filed after the reasons for judgment of the parish court judge is received. Regrettably, this court has neither the notes of evidence, nor the reasons of the Parish Court Judge. The unavailability of the reasons for judgment has placed the respondents at a disadvantage in preparing their appeal.

[59] At paragraphs [47]- [48] of her judgment, the single judge stated:

> "[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."

[60] At paragraphs [49] – [53], the single judge analysed these issues and arrived at the following conclusion:

> "[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.**" (Emphasis added).

[61] In my respectful view, the single judge erred in her legal conclusion in paragraph [56] as, for the reasons to which she referred in paragraph [55], it was not possible to conclude that the respondents had a good arguable appeal.

[62] Upon a review of the affidavit evidence filed before this court, which, in all likelihood, replicated the evidence led before the Parish Court Judge, there were diametrically opposed accounts on important facts. In arriving at a decision in the matter, the Parish Court Judge would have had to assess the credibility and reliability of the witnesses in order to decide whom to believe. In the absence of the notes of evidence or

reasons for judgment, the respondents, in effect, invited this court to nevertheless, on a preliminary basis, conclude that it was highly likely that the Parish Court Judge had been plainly wrong in her assessment of those matters and, ultimately, in her findings of fact.

[63] The applicant, however, has the benefit of a judgment arrived at by the Parish Court Judge after she heard oral evidence, reviewed documentary evidence, including registered titles and diagrams, and assessed the credibility and reliability of the witnesses. In light of the test, which would have to be satisfied before this court interferes with findings of fact arrived at by a first instance judge, which is that the judge was plainly wrong, it is not appropriate for this court to use the respondents' mere factual assertions to undermine the decision of the Parish Court Judge. There was nothing before this court to suggest that the Parish Court Judge erred in arriving at her conclusion. The situation might have been different, had there been a clear error in law in respect of undisputed facts.

[64] It is also of critical importance that the applicant has a registered title for the property on which this disputed roadway is located. The short note to section 70 of the RTA indicates that preferential and prior rights are defeated in favour of a registered proprietor. Admittedly, this does not prevent other persons from acquiring rights over the property subsequent to the issuance of the registered title. Section 70 provides:

> "**Notwithstanding the existence in any other person of any estate of interest…the proprietor of land or of any estate or interest in land under the operation of this Act shall,** except in the 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**…
>
> **Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to**…any public rights of way, and to **any easement acquired by enjoyment or user**…notwithstanding the same respectively may not be specifically notified as incumbrances in such certificate or instrument." (Emphasis added)

[65] The registered proprietor, save for qualifications and incumbrances which are noted on the certificate of title, holds a title free of such matters, however it is expressly provided that easements may be acquired by 'enjoyment or user'. The respondents, by their claim before the Parish Court, attempted to establish that they had acquired an easement over the disputed roadway, which forms a part of the applicant's registered land. The Parish Court Judge, after a trial stretching over seven years, did not accept that they had established their claim. The applicant is, therefore, entitled to the exclusive use of his property, barring any qualifications or incumbrances noted on the certificate of title, until the contrary is proved.

[66] In all the circumstances, the single judge erred when she concluded that the respondents had demonstrated that their appeal was not devoid of merit or in keeping with the applicable test, that they had a good arguable appeal, or a reasonable ground of appeal. There was no material before the single judge that would have supported such a finding.

[67] In light of the above conclusion, it was not necessary for the court to consider the other factors relative to the grant of an injunction in determining whether the single judge ought to have granted an injunction pending appeal.

[68] I therefore accepted the applicant's contention that the injunction that was granted be discharged.

Conclusion

[69] The single judge erred when she granted a stay of execution as the Parish Court Judge's decision did not require any action to be taken by any of the parties to the proceedings, which is a subject of the appeal.

[70] In so far as the injunction which was granted was concerned, in my respectful view, the respondents did not demonstrate that they have a good arguable appeal in the light of the test that has to be satisfied at the hearing of the appeal before this court may properly interfere with the decision of the Parish Court Judge.

[71] I therefore agreed with my sisters that the orders of Simmons JA (Ag) made on 5 March 2020, granting the stay of execution and injunction, be discharged and that consequential orders be made as detailed at paragraph [7] above.

[72] Finally, it must be acknowledged that the respondents are in a difficult position in so far as their ability to pursue their appeal is concerned. It is an embarrassment to the court system that they are unable to, up to this point, receive the notes of evidence and reasons for judgment from the Parish Court. In so far as the notes of evidence are

concerned, however, it may be useful for the respondents to seek to procure the notes taken by counsel who appeared in the proceedings at the parish court and see whether these can be agreed.