Fresh evidence on appeal: recent comments from the Eastern Caribbean Court of Appeal

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It is an important policy of appellate jurisdictions that litigants should not be permitted to use the appeals process as an opportunity to improve upon the evidence they relied on in the court of first instance. The appeals process exists to correct errors in the decision of the court below and not to provide an unsuccessful litigant with a hearing de novo. However, in certain circumstances it will be in the interests of justice for the Court of Appeal to admit evidence that was not before the trial judge.

While the Eastern Caribbean Civil Procedure Rules, 2000 ("**CPR**") do not contain a specific rule governing the admission of fresh evidence on appeal, the Court of Appeal has developed a body of case law which sets out the approach the court will adopt when asked to consider evidence that was not before the court of first instance. This article gives an overview of the Court of Appeal's approach to admitting fresh evidence, how a recent judgment has clarified the law in this area, and how prospective litigants best protect their position.

Ladd v Marshall: test or guidelines?

The most well-known and authoritative explanation of the law governing admitting fresh evidence on appeal is to be found in an old English case, *Ladd v Marshall* [1954] 1 WLR 1489. Under *Ladd v Marshall*, fresh evidence would be allowed on an appeal against a final decision only if the evidence:

- could not have been obtained with reasonable diligence for use at the hearing in the lower court
- was such that, if given, would probably have had an important influence on the result of the case, though it need not be decisive
- the evidence must be such as is presumably to be believed; it must be apparently credible,

though it need not be incontrovertible

Prior to the introduction of the CPR, *Ladd v Marshall* largely represented the entirety of the legal position on this issue. The CPR, however, transformed the landscape of civil procedure. In particular, the CPR introduced the concept of an overriding objective. The overriding objective (CPR 1.1) ensures that cases are dealt with justly. This includes, among other things, ensuring that the parties are on an equal footing, saving expense, dealing with cases in a way which is proportionate to the value of the case, the importance and complexity of the case and the financial position of the parties. CPR 1.2 requires the court to give effect to the overriding objective when exercising any discretion given to it in the CPR.

Subsequent to the introduction of the CPR, the decision of the Court of Appeal on whether to admit fresh evidence is a discretion subject to the overriding objective.[1] The principles enunciated in *Ladd v Marshall* remain instructive, and while they represent "the whole field of relevant considerations to which the appeal court must have regard"[2], they exist as guiding principles and not as a rigid test.

It should be noted at this juncture that the Court of Appeal's approach to the question of admitting fresh evidence is more flexible when the appeal is from an interlocutory decision.[3] On an interim appeal, fresh evidence might also be admitted if there has been a material change in circumstances.[4]

Caribbean Development

The *Ladd v Marshall* criteria have been applied consistently by the Eastern Caribbean Court of Appeal, both prior to and after the introduction of the CPR. In *Guy Joseph v The Boundaries Commission* [2015] ECSC J0406-2, Pereira CJ considered that the jurisprudence in this area was so well-known that it could be considered trite law.

The difficulty with the comments in some judgments in the Court of Appeal was that, in an effort to underline that the court would adopt a more flexible approach in interlocutory appeals, the court perhaps overstated the rigidity of the *Ladd v Marshall* criteria in appeals following a trial.

In *Guy Joseph v The Boundaries Commission*, for example, Pereira CJ described how "the test as set out in *Ladd v Marshall* applies in all its rigour when fresh evidence is sought to be introduced on appeal following a trial or full hearing on the merits." The Court of Appeal used similar language in *Nam Tai Inc v IsZo Capital LP* [2021] ECSC J1006-3 where it said:

"An appellate court must be mindful of the important and laudable principle that cases are to be decided on the evidence led at trial so as to bring finality to litigation. Therefore, the *Ladd v Marshall* principles must be applied with rigour and the appellate court must be satisfied that the three limbs of the test are met before a fresh evidence application, in an appeal, can be granted."

The problem with these comments was that they overlooked the importance of the development of the law in this area subsequent to the introduction of the CPR. The starting point is not to consider whether the appeal is from an interlocutory or final hearing and then to apply the *Ladd v Marshall* criteria with rigour or with flexibility as the case demands. Rather, the starting point is that the question of admitting fresh evidence involves the exercise of a discretion. That discretion is subject to the overriding objective and the *Ladd v Marshall* principles provide a framework, not a straitjacket, for the court.

In a recent judgment, the Court of Appeal brought some welcome clarity to this area of law. In *Chia Hsing Wang v XY* [2023] ECSC J0606-2, Farara JA was asked to consider three separate applications for fresh evidence arising in one appeal. He held:

"It is well-established that the *Ladd v Marshall* criteria are principles and not rules or special rules to be strictly applied by the court. Accordingly, a party seeking to adduce fresh evidence does not have to show some special ground for the grant of permission to rely on such evidence in the appeal. However, these criteria are to be applied with considerable care and in accordance with the overriding objective of doing justice enshrined in CPR 1.1."

Clarifying the way in which the court should approach applications to admit fresh evidence is a welcome development and will provide prospective litigants with a clearer understanding of what is expected of them on appeal.

What litigants should do

Modern commercial life can be fast-paced and indifferent to public holidays or traditional business hours. It is easier now than ever to communicate and to share documents across time zones and great distances. This can lead to litigants expecting fast if not immediate results from the legal system as much as they would from a commercial service provider.

The difficulty in the context of litigation is that by acting with haste, a litigant can sometimes overlook the importance of certain documents, or the impact on the merits of their case of a particular telephone call or meeting. Where a litigant is seeking urgent injunctive relief, these missteps are more readily understood by the Court of Appeal, but it would be a mistake to believe that the Court of Appeal will indulge a careless litigant, still less one who does not respect the court's processes. Equally, there are numerous cases where a litigant seeks final relief but in a hurry, for example, where they apply to set-aside a statutory demand issued under the Insolvency Act, 2003. In such cases, the Court of Appeal will be much less forgiving.

It is important for a litigant to give full and clear instructions to their legal practitioners from the outset. What might seem irrelevant in the early stages of preparing a claim or application could turn out to be significant. It might be much too late to raise the point before the appellate court unless the *Ladd v Marshall* criteria can be prayed in aid. It is always better to take time to consider

the full factual matrix of your claim, and to allow your legal practitioner to decide the relevance of a document or other piece of evidence. It may not always be possible to move "wisely and slow" but a litigant should heed the warning "they stumble that run fast".

[1] See *Evans v Tiger Investments Ltd* [2002] EWCA Civ 161 and *Guy Joseph v The Boundaries Commission* [2015] ECSC J0406-2

[2] *Terluk v Berezovsky* [2011] EWCA Civ 1534

[3] *Guy Joseph v The Boundaries Commission* [2015] ECSC J0406-2

[4] *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982

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