[2017] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 242/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**LILIETH DOUGLAS**	**APPLICANT**
AND	**ERROL FRANCIS**	**RESPONDENT**

Andrew Graham instructed by Bishop and Partners for the applicant

Gordon Steer instructed by Chambers Bunny and Steer for the respondent

21 March and 7 April 2017

PHILLIPS JA

[1] I have read in draft the judgment of Edwards JA (Ag) and I agree and have nothing useful to add.

F WILLIAMS JA

[2] I too agree and have nothing further to add.

EDWARDS JA (AG)

Background

[3] This is an application for permission to appeal the orders of Straw J made on 19 December 2016. By those orders the learned judge refused the application made to her by the applicant to reopen her case to call further evidence to prove her claim that she was a spouse within the meaning of section 2 of the Property (Rights of Spouses) Act ('PROSA'). This followed a full hearing of a preliminary issue raised on the applicant's claim under PROSA, as to whether she was a spouse. After the hearing of the preliminary issue on which witnesses were called, including the applicant and the respondent and their respective witnesses, the matter was adjourned for written submissions to be delivered by the parties. On the date fixed for the delivery of the submissions, the applicant filed a notice of application for court orders supported by affidavit, seeking to be permitted to reopen her case.

[4] The course of events relates back to the filing of a fixed date claim form on 10 June 2013, where the applicant sought declarations that she was entitled to an interest in several properties under PROSA. The parties were never married and there is no issue that both the applicant and the respondent were single for the period of their relationship. It being a common law relationship, the applicant's first duty in the court below was to show (especially in the face of allegations to the contrary) that she lived with the respondent for a period of not less than five years and qualified to be treated as a spouse under PROSA.

[5] In light of the disputed facts which arose in this case as to whether the parties were spouses, it was necessary to determine if the applicant was qualified to bring a claim under PROSA. To that end when the matter came before Batts J for case management conference on 7 November 2014 he made the following orders:

> "1. Matter adjourned to the 25TH [sic] June 2015 at 10:00 a.m. for one (1) day for preliminary issues [sic] as to whether Claimant is a spouse within the meaning of the Property (Rights of Spouse) Act 2004;
>
> 2. Affidavit specific to that issue only are [sic] to be for:
>
> (a) Claimant to file and serve affidavit on or before the 20th February 2015;
>
> (b) Defendant to file and sere [sic] affidavit in reply on or before 17th April 2015.
>
> 3. All deponents to attend for cross examination on the 25th June 2015;
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> 4. Standard Disclosure on this preliminary issue on or before 16th January 2015;
>
> 5. Inspection of documents on or before 23rd January 2015;
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> 6. Parties are to agree Bundle of documents if possible and if so agreed bundle to be filed on or before 12th June 2015;
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> 7. Parties to proceed to mediation;
>
> 8. Case Management Conference adjourned to the 22nd September 2015 at 10:00 a.m. for 1 hour;
>
> 9. Claimants [sic] Attorneys-at-Law to prepare file and serve orders herein;
>
> 10. Costs to be cost in the Claim."

[6] By notice of application for court orders filed 24 June 2015, the applicant sought an extension of time to comply with the orders of Batts J. This application was heard by F Williams J (as he then was) on 25 June 2015 and he made the following orders:

> "1. Application by the Claimant's Attorneys-at-Law for adjournment is hereby granted. Trial of preliminary issues [sic] adjourned for two (2) days: 16th and 17th March 2016.
>
> 2. All affidavits previously filed out of time to stand as if filed on time.
>
> 3. Time for claimant to file further affidavits extended to 31st July 2015.
>
> 4. Defendant permitted to file and serve affidavit in response on or before 30th October 2015.
>
> 5. No further affidavits to be filed and served after 30th October 2015 without leave of Court.
>
> 6. All affiants to attend for cross-examination.
>
> 7. Judge's bundle to be filed by the Claimant's Attorney-at-law on or before 29th February 2016 and a copy served on Defendant's Attorneys-at-Law on or before 29th February 2016.
>
> 8. Cost of today's hearing to Defendant [sic], to be agreed or taxed and the sum to be paid within sixty (60) days of agreement or taxation.
>
> 9. Next Case Management Conference set for 22nd September 2015 is vacated.
>
> 10. Claimant's Attorneys-at-law to prepare, file and serve this order."

[7] On 16 and 17 March 2016, the matter came before Straw J who heard evidence on the question of whether the applicant was a spouse and adjourned the hearing pending written submissions from both parties to be delivered on 3 June 2016. On 3

June when those written submissions were to be received, the applicant, instead, sought by way of notice of application for court orders filed 3 June 2016 to reopen the hearing of the preliminary issue and to adduce further evidence. This further evidence, she claimed, would assist the court in making its determination as to whether she was a spouse. The grounds for the application were that (a) the information was necessary to resolve several issues at trial or between the parties (b) it was made pursuant to Part 1 of the Civil Procedure Rules, 2002 and (c) it was also made pursuant to the Judicature (Supreme Court) Act.

[8] After hearing submissions from both counsel on that application, the learned judge refused to allow the applicant to reopen her case to adduce further evidence. She also refused leave to appeal her decision. Her decision on the preliminary issue is still reserved.

[9] Before this court then, is the renewed application for permission to appeal the learned judge's refusal.

The evidence led on the preliminary point

[10] Section 2 of PROSA, inter alia, states:

> " 'spouse' includes –
>
> (a) A single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
>
> (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,

> immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.
>
> (2) The term 'single woman' and 'single man' used with reference to the definition of spouse include widow or widower, as the case maybe, or a divorcee."

[11] In an attempt to satisfy the requirements in section 2 the applicant filed several affidavits. On 16 April 2015, the applicant filed an affidavit exhibiting four documents:

(a) an invoice from the House of Tranquillity
(b) a bill from JPS labelled Final Bill
(c) A Medical report
(d) Letter from Dr Patrice A Pinkney

[12] The respondent filed and served an affidavit in response on 12 May 2015.

[13] The affiants Andre Francis and Sharon Shae also filed affidavits on behalf of the applicant on 12 May 2015. On 31 July 2015, the respondent caused two affidavits to be filed on her behalf from Maxine Norton and Nadia Massey. By the time of the hearing of the preliminary point by Straw J, the applicant had filed five affidavits and provided standard disclosure. Evidence on the preliminary point was heard on 17 and 18 March and 4 May 2016.

[14] The applicant contends that she lived with the respondent from 2006 at a home owned by the respondent. It is also her contention that towards the end of 2006, she moved with the respondent to premises at Plantation Springs, 130 Calabar Mews, Kingston 20, in the parish of Saint Andrew. She claims to have resided with the respondent at this address for approximately four years. The respondent strenuously

denied that they lived together at Calabar Mews but admitted to having an intimate visiting relationship with the applicant at that address.

[15] It was not disputed however, that they lived together as man and wife from February 2011 to April 2013, at a house owned by the respondent at Smokey Vale in the parish of Saint Andrew. This is a period amounting to only two years and approximately two months. To qualify as a spouse, the court would have to accept that the parties lived together as man and wife from 2006. The relationship between the parties ended in 2013.

[16] At the hearing, the applicant gave evidence and called two of her witnesses to be cross-examined. The respondent himself gave evidence having filed two affidavits and called two witnesses for cross-examination. During the cross examination, it was put to the respondent that whilst they were living at Calabar Mews, it was he who bought all the items of furniture for the home and paid all the rental and utility bills, as the applicant was unemployed at the time. The respondent strongly denied this. On the final day of the hearing the learned judge ordered that written submissions were to be filed and delivered on the 3 June 2016. As earlier stated, instead, the applicant filed the notice of application for court orders seeking the orders which were refused by Straw J and which now forms the basis of the application for permission to appeal before this court.

The application to reopen evidence on preliminary issue that was denied

[17] The notice of application filed on 3 June 2016, sought the following orders:

"1. That the Affidavit of Lilieth Douglas dated the 3rd June 2016 be permitted to stand;

2. That Mrs Jean Waugh-Evans, the Customer Care Officer of the Jamaica Public Service Company be subpoenaed as witness to give evidence that the JPS bill for 130 Calabar Mews, Kingston 19 was posted to Lilieth N. Douglas 20A Peak Close, Kingston 2;

3. Mr Richard Bowen be subpoenaed as witness to give evidence that the [respondent] paid rent for 120 Calabar Mews using cash and cheque from his business during the period that the Applicant resides [sic] at the said premises;

4. That the manager of Grande Lido Braco Hotel be subpoenaed to give evidence that both the [Applicant] and the [respondent] checked into the said hotel and stayed from [sic] for a weekend in the latter part of 2009;

5. That the [sic] Ms. Constance Hoo, the Manager of Guardian Group be subpoenaed to give evidence that both the [applicant] and the [respondent] were on one medical insurance [policy] and cards were issued and used by both parties;

6. That Ms. Charmaine Gayle be subpoenaed to give evidence that items of furniture were selected by the [applicant] and paid for buy [sic] the [respondent];

7. That the [respondent] be ordered to provide proof of purchase of items of furniture from abroad;

8. That [costs] be cost in the claim; and

9. Such further and other reliefs and orders as this Honourable Court deems fit and proper in the circumstances."

[18] Both parties made submissions in writing to the learned judge on the application.

[19] Attached to the affidavit in support of the application to reopen the case, amongst other things, were several copies of cheques allegedly signed by the respondent for payment of rent for Calabar Mews during the period the applicant alleges it had been occupied by both parties. The respondent did not file an affidavit in response to the appellant's affidavit.

[20] As said previously, on 19 December 2016, the judge gave her decision in writing refusing the application to reopen and denied leave to appeal.

The issue

[21] The simple issue for determination by this court is whether the applicant has any real prospect of success in arguing on appeal that the trial judge erred in refusing the application of 3 June 2016.

The submissions

[22] The first point this court is being asked to decide is whether the learned judge applied the correct principle in considering and refusing this application. The learned judge below relied substantially on the principle laid down in **Ladd v Marshall** [1954] 1 WLR 1489.

[23] Counsel for the applicant questioned whether this was a case of adducing fresh evidence and therefore, whether the principles expounded in **Ladd v Marshall** would apply or some variant thereof. He argued that the question for this court was whether or not a judge had the discretion to hear further evidence that was relevant to issues to

be determined at the close of the hearing on the preliminary point, regardless of whether the principle relied on was that of **Ladd v Marshall** or some variant thereof.

[24] Counsel for the applicant pointed out that she had given evidence that the respondent lived with her at Calabar Mews for the period 2006 to 2011. Counsel submitted that the additional evidence sought to be adduced by the applicant was only to provide receipts and copies of returned cheques to show that the respondent was not being truthful to the court when he said he had not paid any rental for the premises. It was submitted that this was relevant information going to the credit of the respondent and the learned judge below ought not to have ignored the credibility of the witnesses in arriving at a decision. Counsel further argued that the evidence sought to be adduced was by way of rebuttal evidence and the learned Judge erred in refusing to allow it to be adduced.

[25] Counsel submitted that in light of the above, the applicant has a good arguable case and is likely to succeed on the appeal.

[26] Counsel for the respondent submitted that the judge was correct to apply the principles in **Ladd v Marshall** and reject the application.

Principles applicable to the grant of permission to appeal

[27] The application for permission to appeal the order of Straw J was filed December 28, 2016 and is supported by the affidavit of Mr Keith N Bishop. It perhaps need not be stated here that, in the circumstances of this case, permission to appeal is required by virtue of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act.

[28] It is however, rule 1.8(9) of the Court of Appeal Rules which provide the basis upon which this court is enjoined to grant such permission. Rule 1.8(9) provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[29] This court has previously accepted that the phrase "real chance of success" is synonymous with the term "realistic prospect of success" as used by Lord Woolf in the seminal case of **Swain v Hillman and another** [2001] 1 ALL ER 91 (see **Duke St John- Paul Foote v University of Technology Jamaica and Wallace** [2015] JMCA App 27A). This formulation therefore, directs this court to determine whether the applicant has a realistic chance of success as opposed to a fanciful one.

[30] In order to consider the applicant's realistic prospect, it necessitates a consideration of the merits of the case. I have already outlined briefly what the issues were that arose on the preliminary point and the complaints made by counsel for the applicant about the manner in which the learned judge disposed of the application to reopen. In essence he complains that the learned judge applied the wrong principle of law in considering the merits of the application to reopen and failed to appreciate that the evidence was being called in rebuttal and was directly relevant to the issue she had to determine, which was whether the applicant was the respondent's spouse.

Analysis

The judge's decision

[31] The submissions made before the learned judge, as outlined in her judgment, are in large part the same submissions made before this court. In order to determine whether there is a real prospect of success on the question of whether the judge exercised her discretion on a wrong principle of law, it is important to look at what the judge did consider in coming to her decision.

[32] In a reasoned, detailed judgment, the learned judge itemized and discussed the various rules called in aid by the applicant and found that the CPR did not contemplate adducing evidence after a party had closed its case or at the end of a trial. She found that reliance on the CPR by the applicant was misplaced. She also found that the case of **Bromfield v Bromfield** [2015] UKPC 19, relied on by the applicant was not relevant to the instant case. At paras 40 and 41 she said:

> "With regards to the sole case relied upon by counsel for the claimant/applicant, **Eutetra Bromfield (Appellant) v Vincent Bromfield (Respondent) (Jamaica)**. This court is of the view that the reasoning and in particular the criticism of the Board (set out at paragraph [15] herein) is inapplicable to the instant application. It should be noted that the Board was making its criticism in relation to the court's discharge of a statutory duty. Pursuant to section 14(4)(a) of the **Maintenance Act**, with regard to the amount and duration of financial support, the court is required to consider the circumstances of the parties including a number of matters which are set out in the said Act. To this end, the Board made mention of the court's specific powers to obtain information where parties have failed to provide it. It is noted that with the exception of Part 1, the rules mentioned by the Board (i.e. rules 28.6,

34.2, 11.12(1) and 76.3(1) are the exact rules which were cited by counsel for the claimant/applicant.

It must be emphasised that the Bromfield case is distinguishable from the instant one. It is clear that where a court is required by statute to consider a list of circumstances in making its determination, it is duty bound to do so. As such it goes without saying that where the parties have failed to provide the court with credible information and the court forms the view that it cannot properly discharge its duty; in those circumstances a court may then, in furtherance of the overriding objective, exercise its extensive power(s) which includes its power to make orders of its own initiative (pursuant to rule 26.2). It bears mentioning that it is the duty of the parties to help the court to further the overriding objective (rule 1.3) which includes ensuring that cases are dealt with expeditiously and fairly and allotting an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[33] At para 44 of her judgment she said:

"While counsel for the claimant/applicant has not expressly asked that the case be re-opened or that fresh evidence be received, this is essentially what is being asked of the court. As such I agree with counsel for the defendant/respondent's framing of the issue and I am guided by the *locus classicus* of **Ladd v Marshall** which was relied upon by counsel for the defendant/respondent in opposition to the re-opening of the case and/or the reception of fresh evidence."

[34] At para 46 she said:

"Counsel for the defendant/respondent made strident submissions with regards to these three (3) conditions/factors, which were summarised at paragraphs [24] - [32] herein. Particularly impactful were counsel's submissions in relation to the first condition/factor, I am inclined to agree with what counsel deemed the "fatal omission", namely that the claimant/applicant has failed to show that the evidence which is now being sought to be adduced could not have been obtained with reasonable diligence for use at trial."

[35] At para 54 she said:

> "I have noted that the grant of any or all of these orders would necessitate giving the defendant/respondent an opportunity to file affidavit(s) in response, cross-examine the witnesses called, call further witnesses and/or to request specific disclosure of other documents. Having considered the principles from **Ladd v Marshall**, the **Civil Procedure Rules** and in particular the overriding objective which encompasses considerations of fairness, I am of the view that there is no justification to grant any of the orders sought by the claimant/applicant. I am also guided by general rules of practice which are stated by the learned authors of **Murphy on Evidence** 12th edition at paragraph 17.17 -
>
> > 'The general rule of practice, in both criminal and civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case; see e.g. Kane (1977) 65 Cr App R 270. This involves the proposition that the parties should foresee, during their preparations for trial, what the issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a civil case by exchange of statements of case and witness statements ... is designed to enable this to be done wherever possible'."

What are the important considerations in this case?

[36] One of the most important considerations regarding the prospect of success on the appeal is whether the applicant will be able to successfully show that the learned judge did indeed apply the wrong principle of law or took the wrong approach to the exercise of her discretion.

[37] It is true, as stated by the learned judge, that the general rule is that a party is expected to adduce all the evidence on which he intends to rely before closing his case.

So, in **Jacobs v Tarleton** (1848) 11 QB 421 where the plaintiff sued as an indorsee of a bill of exchange in circumstances where the onus of proof on the single issue joined was on the plaintiff, it was held that he would not be allowed, after the defendant had closed its case, to call further evidence to strengthen and confirm his case. See also **Rowlandson v Fenton and Rogers** (1853) 17 Jur 606; 1 CLR 344, which confirmed the rule that a plaintiff could not give evidence in reply which was merely confirmatory of his original case.

[38] However, several exceptions to the general rule have developed both in the criminal law and in the civil arena which were recognised in the two cases referred to above. In a number of cases a party may be allowed to call evidence in rebuttal after the close of the defendant's case, to rebut the evidence of the defendant on issues, the proof of which, rested with the defendant. Where the claimant was allowed to do so, the evidence had to be strictly confined to rebuttal evidence and could not merely be such as to confirm the evidence given in chief. See for instance **Penn v Jack** (1866) LR 2 Eq 314, a case involving a patent, where the plaintiff was allowed to call rebuttal evidence contradicting the defendant's claim of prior use; and **Rogers v Manley** (1880) 42 LT 584, where leave was given to the plaintiff after the evidence on both sides was closed, to call further evidence to rebut the defendant's denial that he was in the plaintiff's house at a particular time. See also **Shaw v Beck** (1853) 155 ER 1401, where it was held that the County Court was wrong to refuse the plaintiff leave to adduce evidence in reply to rebut a case of fraud set up by the defendant and a new trial was ordered.

[39] Finally, in **Wright v Willcox** (1850) 9 C.B. 650, in a case of trespass for false imprisonment, it was held that it was in the discretion of the judge, subject to review, to determine at what stage of the 'cause' evidence may be produced; and that the judge had rightly exercised his discretion to allow the plaintiff to call evidence in reply to contradict the defendant's evidence and that no injustice had been occasioned by it.

[40] There is therefore a wide discretion in a judge to allow a plaintiff to call evidence in rebuttal after the close of the defendant's case and this has existed since time immemorial.

[41] This discretion is similar or akin to the two common law exceptions to the general rule in criminal law. The first exception is where evidence will be allowed after the close of the case in rebuttal of matters which have arisen *ex improviso* which no ingenuity could have foreseen. The second exception is where evidence was omitted by oversight or inadvertence and the judge will exercise a discretion to allow such evidence to be adduced where it is of a formal or non-contentious nature. Outside of these two well established exceptions is a general discretion to allow evidence to be adduced after the close of a party's case where not to do so would lead to unfair and undue prejudice.

[42] In civil cases under the regime of the CPR, regard has to be had to the overriding objective and the court will take a similar approach.

[43] The exceptions to the general rule have been extended to cases where judgment has been reserved but not yet delivered or delivered in draft but not yet perfected or

delivered but the order has not yet been drawn up. See **Stocznia Gdanska SA v Latvian Shipping Co** (2000) LTL 12/2/2001 cited in Blackstone's Civil Practice 2005, paragraph 47.52. In that case, the claimants, after the close of the trial but before judgment had been handed down, sought to adduce further relevant evidence, namely, a document which ought to have been disclosed by one of the defendants and which the claimants could not have obtained by other means. It was held that the claimants could rely on the document and that, in accordance with the overriding objective, it would not be just to ignore it.

[44] A judge has the jurisdiction to exercise a discretion to alter a judgment before perfection. See **Re Barrel Enterprises and Others** [1972] 3 All ER 631 (the Barrel jurisdiction). The basis of this jurisdiction is that the judge retains control of his case, even up to judgment and before the orders are perfected. This extends to the right to reconsider the matter of his own motion or on application of either party or to hear further argument on a point on which he had already made a decision and handed down judgment, so long as his orders had not yet been perfected. It also includes the discretion to allow the amendment of pleadings or calling further evidence or further arguments at that stage. See **Charlesworth v Relay Roads Ltd (in Liquidation)** [1999] 4 All ER 397. In **Fisher v Cadman** [2005] EWHC 377 (Ch) it was held that where the application to reopen is made after judgment but prior to it being perfected, the principles in **Ladd v Marshall** are to be applied with more flexibility than they are applied in an appeal court but that the threshold before new evidence is allowed is a high one.

[45] It has also been held that reopening contentious matters or permitting one party or the other to add to their case or make a new case after the close of evidence should only exceptionally be allowed. See **Gravgaard v Aldridge and Brownlee (a firm)** [2004] EWCA Civ 1529, cited in The Caribbean Civil Court Practice 2011, page 379 note 30.4.

[46] It is clear on the authorities, therefore, that it is in the discretion of the high court to reopen civil proceedings to receive further evidence, at any stage, even after judgment but before the order is perfected. However, the basis of the exercise of this discretion between these extremes is different. Where the discretion is being considered before judgment, the principles on which the court will act surrounds questions of relevance, fairness, prejudice, delay and under the CPR regime – on a consideration of the overriding objective. At this end of the spectrum, what the applicant to reopen the case is trying to do, is to persuade the court that the evidence is relevant to the issue to be determined and if it is not heard it may result in an unfair and unjust decision.

[47] The CPR makes no provision for rebuttal evidence so the court has to be guided by the overriding objective, the applicable common law principles and rules of practice. Factors the court ought to consider include:

1. Whether the evidence was being given in rebuttal;
2. The stage of the proceedings;
3. The nature and relevance of the evidence;

4. Any prejudice which may result from allowing the evidence to be adduced;

5. Any possible effect from the delay;

6. Any explanation given for not calling the evidence before (previous availability of the evidence);

7. The interests of justice.

[48] Where judgment is reserved or has been delivered but not perfected, the court will consider factors similar to **Ladd v Marshall** in determining whether the overriding objective will be achieved by allowing further evidence at that stage. See Blackstone's paragraph 59.40. Implicit in this consideration is the principle of finality of litigation. At this stage what the applicant to reopen tries to do is to persuade the court that if it had heard the further evidence it would have come to a different conclusion. That is not the position of an applicant still at the trial stage.

[49] In the case before Straw J judgment had not been reserved, the case having been adjourned for written submissions. It is also relevant to this application to note that the proceedings before Straw J were interlocutory. What the learned judge was hearing was a preliminary issue which, if it were determined in favour of the respondent might have brought the claim to termination but if it were determined in favour of the applicant, it would not terminate the claim. Furthermore, the order made by Straw J refusing the application to reopen the case was an interlocutory order as distinct from a final one.

[50] In that regard, it is important to note, that even if it were accepted that the rules which apply to fresh evidence before the Court of Appeal can apply to application to

adduce fresh evidence in the High Court, the strict rules in **Ladd v Marshall** are not applicable to interlocutory proceedings. See the judgment of this court in **Russell Holdings Limited v L&W Enterprises Inc and another** [2016] JMCA Civ 39 citing and approving the reasoning in **Canada Trust Company and another v Stolzenberg and others (No 4)** All England Official Transcript (1997-2008), delivered 12 October 2000. In interlocutory matters, the court has a general discretion which it ought to exercise by considering such factors as: (a) the nature of the application, (b) the reason why the evidence was not adduced earlier and (c) the nature of the evidence. All this against the background of the overriding objective of dealing with cases justly.

[51] It is arguable therefore that the applicant has a real prospect of success in arguing that, in the circumstances of this particular case and the nature of the application, in so far as the judge substantially relied on the strict application of **Ladd v Marshall** in exercising her discretion to refuse the application, she fell into error.

Disposition

[52] I find that based on the above principles and the judge's reasoning, the applicant has a real chance of success in this appeal. I propose therefore, that permission to appeal be granted. I would also propose that costs of this application be costs in the appeal.

PHILLIPS JA

ORDER

1. Permission to appeal is granted.

2. The applicant is to file and serve its notice and grounds of appeal within 14 days of the date hereof.

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