[2010] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO. 16/2007

APPLICATION NO. 150/2009

BEFORE: THE HON. MR JUSTICE PANTON, P
THE HON. MR JUSTICE DUKHARAN, JA
THE HON. MISS JUSTICE PHILLIPS, JA

BETWEEN	**ROSE HALL DEVELOPMENT LIMITED**	**APPLICANT**
AND	**MINKAH MUDADA HANANOT**	**RESPONDENT**

Michael Hylton, QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the applicant

Miss Judith Clarke and Miss Vonique Mason instructed by Bryan A Clarke & Co for the respondent

19, 21 October and 26 November 2010

PANTON P

[1] This is an application for leave to adduce fresh evidence in the form of satellite images of certain lands, the subject of the dispute between the parties.

[2] On 21 October, we dismissed the application to adduce fresh evidence with costs to the respondent to be agreed or taxed, upheld the judgment of the

Resident Magistrate and made an order for her to determine the boundaries of the disputed area. We promised then to put our reasons in writing. This is a fulfillment of that promise.

[3] The suit that gave rise to the appeal is a plaint filed on 28 June 2006, in the Resident Magistrate's Court, St James, wherein the applicant claimed damages for trespass against the respondent. The respondent gave notice of a special defence to the claim, namely, that the suit was statute barred by virtue of section 3 of the Limitation of Actions Act. That section reads:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

At the commencement of the trial, the defence was stated thus:

> "The defence is as stated in the special defence. In addition the land which is the subject of this claim and which is occupied by the defendant is not owned by the plaintiff."

[4] On 28 June 2007, Her Honour Miss Carolyn Tie, Resident Magistrate for the parish of St James, entered judgment in this matter for the respondent with costs

agreed at $35,000.00. Her reasons for judgment are dated 8 October 2007 and the notification to the parties is dated 16 October 2007.

[5] The applicant filed a notice of appeal on 6 July 2007 challenging the Resident Magistrate's finding that the respondent had demonstrated an intention to dispossess the applicant which is the registered owner of land said to include the disputed area. The original grounds of appeal were abandoned before us on 19 October 2010, and we gave leave to add a solitary ground of appeal as follows:

> "The learned Resident Magistrate failed to define the boundaries of the land covered by her ruling."

[6] The Resident Magistrate found that the respondent had lived on, and cultivated the property in excess of 12 years prior to the filing of the suit, that is, from as long ago as 1972. She found that the respondent had also fenced the disputed area and had had water connections made. She rejected the evidence presented by the applicant to the effect that the respondent had been a recent occupant of the property who had refused to acknowledge the respondent's ownership and had rejected lease terms offered to him and others in a similar position.

[7] The applicant sought to adduce fresh evidence in the form of satellite images purchased from the National Land Agency, Spacial Innovision and

GeoOrbis. These images were collected in 1991, 1999, 2002 and 2003. The images are supposed to be showing the absence of a building on the property at the location claimed by the respondent at any time prior to 1999. There is an analysis to this effect by Mr Christopher Mayberry, B.Sc in anthropology and geography. This, Mr Michael Hylton, QC has submitted, is evidence which would have had an important influence on the outcome of the case.

[8] In determining the fate of this application, the court was guided by the well-known principles expressed in ***Ladd v Marshall*** [1954] 3 All ER 745. Halsbury's Laws of England Fourth Edition Reissue Vol 17(1), in acknowledging this, states at para 441:

> "Unless it orders otherwise, the appeal court will not receive oral evidence or evidence which was not before the lower court. For the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be (1) evidence which could not have been obtained with reasonable diligence for use at the trial; (2) such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) such as is presumably to be believed. These criteria need to be applied as guidelines rather than rules and subject to the overriding objective of dealing with cases justly. The critical question is whether the fresh evidence could have been obtained with reasonable diligence for use at the trial and if it could have been then permission to adduce it in evidence should be refused."

[9] In note 5 relating to the above-quoted paragraph, the editors of Halsbury's referred to the case of ***Taylor v Lawrence*** [2002] 2 All ER 353, where Lord Woolf, CJ states that the rule in ***Ladd v Marshall*** was "an example of a fundamental principle of the common law – that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation".

[10] In the instant case, I am driven to the view that the satellite images were clearly available at the time of the trial. Mr Mayberry (para 5 affidavit, p 70 record of appeal) said that he "sourced **available** (emphasis added) geographic imagery and obtained information regarding the geographic coordinates for the location of Mr Hamanot's house". No good reason has been advanced for the delay in sourcing and presenting this available evidence. In the circumstances, I agreed with Miss Clarke that ***Ladd v Marshall*** does not avail the applicant. Consequently, I did not think I need consider anything else. However, I wish to point out that the images have not touched on the question of the respondent's cultivation which the learned Resident Magistrate accepted as being part of the activities pursued by the respondent over the years on the property.

[11] It was for the abovementioned reasons that I agreed with the order to dismiss this application with costs to the respondent to be agreed or taxed. So far as the appeal itself was concerned, given the nature of the sole ground of appeal, I agreed to uphold the judgment of the Resident Magistrate but make an order for her to determine the boundaries of the disputed area in keeping with the evidence that was before her, particularly that as to fencing.

DUKHARAN, JA

[12] The applicant is the registered proprietor of lands at Rose Hall in the parish of St James. The applicant sought to recover damages for trespass against the respondent in respect of those lands. The respondent claimed that the registered title has been defeated because he has enjoyed continuous undisturbed possession for more than 12 years.

[13] The learned Resident Magistrate found that the claim for adverse possession in favour of the respondent was established and that he had been living in a house at the same location for 35 years prior to the date of judgment. The learned Resident Magistrate, at page 52 of the record of appeal, said inter alia:

> "The [respondent] has lived undisturbed on the land since 1972 when he went to live with a relative in a wattle and daub house on the property … [and] that he replaced this house with a wooden house in 1974 … [and] that the house was again replaced after the passage of hurricane Gilbert …"

[14] There were two applications before the court. The first was to adduce fresh evidence and the second for permission to amend the grounds of appeal. The original grounds of appeal were abandoned on 18 October 2010 before us and leave granted to add one ground of appeal which was as follows:

> "The learned Resident Magistrate failed to define the boundaries of the land covered by her ruling."

[15] The applicant is seeking to have satellite images admitted into evidence which show that the respondent's house was not on the premises up to 1999. The applicant relies on four affidavits in support of its application to adduce this further evidence. Satellite images were obtained from 1999 to 2003. The images, as analysed by an anthropologist Mr Christopher Mayberry show that no building was on the property up to 1999. Mr Michael Hylton, QC has submitted that the proposed evidence meets the criteria in **Ladd v Marshall** [1954] 3 All ER 745 and should be admitted. He further submitted that the evidence would certainly have had an important influence on the outcome of the case. The learned Resident Magistrate, he said, placed great emphasis on the issue of credibility and she did not have the benefit of any independent evidence in relation to the period of the respondent's occupation of the premises.

[16] This court is cognizant of and guided by the principles laid down in **Ladd v Marshall** and the three conditions that must be fulfilled in order to justify the reception of fresh evidence. As Lord Denning said in that case at page 748:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be

> shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

[17] Learned Queen's Counsel conceded that the fresh evidence could have been obtained with reasonable diligence for use at the trial before the Resident Magistrate. However, Mr Hylton submitted that the modern authorities indicate that the courts now apply the **Ladd v Marshall** criteria in accordance with the overriding objective of the new Civil Procedure Rules 2002. He relied on the cases of **Hamilton v Al Fayed** All ER Official Transcripts [1997-2008]; [2002] EWCA Civ 3012; **Gillingham v Gillingham** [2001] EWCA 906; and **Paterson and Others v Howells and Another** [2005] EWCA Civ 1519. An analysis of these cases would suggest that the court is not placed in the straightjacket of **Ladd v Marshall** when considering whether the special conditions have been satisfied and must be considered in the light of the overriding objective of the Civil Procedure Rules.

[18] In the instant case, the satellite images were certainly available long before the hearing of the action in 2007. No reasonable diligence was exercised and no reason or excuse given as to its absence at the hearing.

[19] It was for the foregoing reasons that I agreed to dismiss the application with costs to the respondent. In relation to the ground of appeal, I agreed also to uphold

the judgment of the Resident Magistrate and make an order for the determination of the boundary of the area in dispute.

PHILLIPS J A

[20] There were two applications before the court. The applicant sought the following orders:

> (1) That the appellant [applicant] be permitted at the hearing of this appeal, to adduce satellite images of the land that the respondent has claimed to have acquired by adverse possession.
>
> (2) That the appellant [applicant] be permitted to amend the notice of appeal filed on 6 July 2007.

[21] The applications argued before the court had changed somewhat as counsel for the applicant indicated that he intended to ask the court to rule on the application for fresh evidence and if that succeeded, then he would ask the court to grant the order prayed for in the amended notice of appeal, namely; that the case be remitted to the Resident Magistrate's Court for a retrial or reconsideration. He indicated that he was no longer pursuing the other grounds of appeal challenging the basis for the Resident Magistrate's finding in favour of the respondent, that he had discharged the onus of proving adverse possession in excess of the statutory 12 years, and so the applicant's claim for trespass in the court below had failed. Additionally, counsel for the applicant indicated that in any event, he would be asking the court to amend the notice of appeal, adding a ground that the learned Resident Magistrate had failed to define the

boundaries of the land covered by her ruling and this court should therefore also consider on that basis, remitting the matter to the Resident Magistrate's Court to be reconsidered or to clarify the boundaries of the respondent's land.

[22] The application to adduce fresh evidence was heard first. Both counsel agreed on the principles of law which govern the use of further evidence on appeal, but they differed with regard to the application thereof to the circumstances of this particular case. It is necessary therefore to revisit, yet again, the principles laid down in the oft cited judgment of Lord Denning in the case of ***Ladd v Marshall*** [1954] 3 All ER 745, where he said on page 748:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

In this case learned Queen's Counsel focused on the second and third criteria leaving the first criterion for the last, understandably so, as the applicant faced a very difficult hurdle on that condition.

[23] The applicant relied on four affidavits in support of its application to adduce further evidence, namely:

(i) Affidavit of Ivor Stewart, a commissioned land surveyor who had visited the site and calculated the co-ordinates of the respondent's house.

(ii) Affidavit of Connell Simmonds, the chief photogrammetrist at the National Land Agency who exhibited two photographs taken on 25 December 1991 and 22 February 1999 showing the same co-ordinates of the respondent's house as identified by the surveyor, who deposed that there was no building at that location as at 25 December 1991, although he was unable to confirm whether there was a building there in 1999.

(iii) Affidavit of Renee Babb, a geographic information systems and remote sensing coordinator at GeoOrbis Inc, who exhibited copies of 2003 satellite images taken from the company's database showing the said coordinates as those of the surveyors.

(iv) Affidavit of Christopher Mayberry who holds a Bachelor of Science degree in anthropology and geography from the University of California, and who has experience in the use of geographic information systems. He deposed that he had analysed the photographs and identified the landmarks. He concluded that there was no house at the coordinates where the respondent's house was then located, in either the 1991 or the 1999 aerial photographs, and stated, that it was not until the 2002 satellite images that a structure was seen at the coordinates where the respondent's house was located. He gave his opinion that the respondent's house was

not present until sometime after the 1999 satellite image was taken, but before the one taken in 2002.

[24] With regard to the second criterion set out in ***Ladd v Marshall*** and the possible influence that this evidence could have on the result of the case, counsel for the respondent forcefully submitted that the proposed evidence was at best "equivocal" and should have no effect at all on the outcome of the case, as the "images" relate to whether or not there was a house at the location in 1991 and or in 1999, and, as counsel rightly argued, the case was not all about the erection of a "house". The case concerned the farming and development of a piece of land of about 5 acres including cash crops, to which there had been the supply of water and around which there was a fence which had been in place for so many years, proving the exclusive possession, by the respondent, of the property, coupled with the intention to dispossess the paper owner. Counsel submitted that, that was the difficulty the applicant had faced below and the "images" could not affect the judgment, as it was also based on that bit of evidence.

[25] Counsel for the applicant had conceded that if the respondent had pitched his case based on the farming and development of the land between the years 1972-1991 and beyond, then the applicant would not have been able to attempt this application at all, as the paper title for the land in respect of the acreage occupied by the respondent would have been extinguished long ago. However, the respondent had framed his case based on the fact that he had gone to the property in 1972 to live with his uncle, and thereafter, when his uncle died and the wattle and daub house started to disintegrate,

he took it down in 1974 and replaced it with another wooden house, which was itself totally destroyed by hurricane Gilbert in 1988. He therefore had to replace it. Then hurricane Ivan did further damage, and he had to repair the house again in 2004. His case, counsel said, was based on his living in a house on the property since 1972, and if it could be shown that there was no house on the property until sometime between 1999-2002, then the credibility of the respondent would have been shaken and the court may have treated his evidence differently.

[26] In fact the learned Resident Magistrate had found that the respondent had made that particular lot his home and that his house had been there over the years. So the question would arise whether, if the further evidence was adduced, it was likely to have affected her view of the credibility of the respondent and his witnesses, one of whom was the builder who deposed to having assisted the respondent in replacing the destroyed structure after the devastation of the hurricanes? In my view, this is quite possible that she could still have found that there was no house on the property until much later on in his occupation of the same, but that he had fenced the land, farmed and developed it, exclusively for over 20 years, or certainly in excess of the 12 years, before suit commenced in 2006. So, the evidence could have had a possible influence on the outcome of the case.

[27] With regard to the third criterion, the affidavit evidence as set out above, of independent impartial professionals, would suggest its potential to be apparently credible. Even though counsel for the respondent challenged the "images" as giving

rise to more questions than answers, and therefore being of little or no assistance whatsoever, I do not agree with her. The evidence is credible.

[28] What then of the first criterion, that is, whether the evidence could have been obtained with reasonable diligence? Counsel for the applicant submitted that modern authorities indicate that the courts now apply the ***Ladd v Marshall*** criteria in accordance with the overriding objective of the new Civil Procedure Rules (CPR). He conceded that if this application was being made before the CPR, he would have had no argument whatsoever, but the applicant is no longer constrained within "a straight jacket". Counsel relied on the following cases: ***Hamilton v Al Fayed*** [2000] EWCA Civ 3012, ***Gillingham v Gillingham*** [2001] ECWA Civ 906 and ***Paterson et al v Howells & Anor*** [2005] ECWA Civ 1519. However, in my view, in these cases there was some evidence to show that efforts had been made to obtain the evidence or there was evidence to explain why not. In this case before us, there was no evidence at all with regard to any attempts to obtain this information which was obviously in existence at the time of trial. There was therefore absolutely nothing on which this court could exercise its discretion. Indeed, in answer to a specific question posed by the court, learned Queen's Counsel said that he could not say why there had not been any efforts made by the applicant before the trial to obtain the images, and stated quite frankly that perhaps the applicant was of the view that its case was strong enough, as the diligence shown subsequent to the trial, if done previously, would have produced the same results. In ***Hamilton v Al Fayed***, Lord Phillips MR in delivering the judgment of the court, indicated that in arriving at their decision, the court was utilizing an approach

which accords with the overriding objective and in adopting that approach, the court was following the guidance to be found in the judgment of May LJ in ***Hickey v Marks*** (CA, 6 July 2000), of Morritt V-C in ***Banks v Cox*** (17 July 2000) and of Hale LJ (as she then was) in ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318.

[29] In the ***Hertfordshire*** case, the new evidence related to the production of a licence issued under the Consumer Credit Act 1974. The licence issued at the trial was not the correct one and the action was dismissed. The first application before the county court for a rehearing was dismissed by the district judge as the fresh evidence did not fulfill the requirements of ***Ladd v Marshall*** as it could have been obtained with reasonable diligence for use at the trial. This was overturned on appeal as the judge found that the evidence may not have been adduced due to a mistake, and that if not adduced could cause considerable detriment to the claimant and there was no prejudice to the defendant. So this was a case, as is the situation here, that the evidence could have been produced with reasonable diligence for use at the trial. In her judgment, Hale LJ noted that the court had before it, a final judgment relating to events which had been given after a trial on the merits at which both parties were present and represented. The principles of ***Ladd v Marshall*** were referred to, and Hale LJ said there were strong reasons for adhering to the approach set out therein which has had a long pedigree. She continued, "It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed".

At paragraphs 35-37 LJ Hale said this:

> "35. The position governing applications to adduce fresh evidence on appeal is now governed by the Civil Procedure Rules, rule 52.11(2). The court will not consider evidence which was not before the court below unless it has given permission for it to be used. It is no longer necessary to show "special grounds". The discretion must also be exercised in accordance with the overriding objective of doing justice. However, in the very recent case of ***Banks v Cox***, decided on 17th July 2000, for which we have the benefit of an, as yet unpublished transcript, Morrit LJ said this:
>
> > 'In my view, the principles reflected in the rules in ***Ladd v Marshall*** remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below.'
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> 36. He referred to another decision of this court, ***Hickey v Marks,*** on 6th July 2000 to that effect. He then went on to consider each of the requirements in Ladd v Marshall in that case. He found that they had all been satisfied and he then went on to consider whether it was just to order a retrial and did so.
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> 37. It follows from all of this that it cannot be a simple balancing exercise as the judge in this case seemed to think. He had to approach it on the basis that strong grounds were required. The Ladd v Marshall criteria are principles rather than rules but, nevertheless, they should be looked at with considerable care and in this particular case, of course, the first of those principles was not fulfilled: the evidence could clearly have been available readily at trial."

And then finally Hale LJ concluded in paragraph 42

> "What then is the conclusion of all of this? This was, of course, an exercise of discretion by the trial judge. But in my view he was unduly affected by the potential prejudice to the claimant. He did not properly address his mind to the fact that this was a final judgment obtained after trial at which both parties had been represented. He did not consider the public policy in there being an end to litigation. In this particular case there was no excuse at all for not producing the proper evidence at the trial: it could have been obtained. There is also no excuse at all for the delay in applying to set aside the order: solicitors should know the rules. It is simply not good enough for professional litigators with legal representation to ask for a double indulgence when there has been no excuse for either default. If this was granted in this case, it is difficult to see a case in which it would not be granted…"

[30] Although that case was not dealing with an application in the Court of Appeal, it was a case dealing with the principles of adducing fresh evidence on appeal. In the final analysis, I agree with the dicta of Hale LJ, as the facts are similar in the instant case in that, the evidence could have been readily obtained, the matter had undergone a full trial with both parties present and represented, and there was also no excuse for not producing the evidence at trial. There must be finality to litigation.

[31] On a final note, counsel for the respondent argued at some length that the evidence should not be accepted as it was inadmissible, in that, it did not satisfy section 31E and G of the Evidence Act. In my view, the admissibility of the evidence would only have become relevant if it were to be dealt with in the appeal. Once the

matter was to be remitted to the Resident Magistrate's Court the admissibility of the evidence would be a matter for that court.

[32] The application to adduce fresh evidence was therefore refused. The appeal was dismissed, with costs to the respondent. The matter however was remitted to the Resident Magistrate's Court for the limited purpose of the Resident Magistrate defining the boundaries of the land covered by her ruling.