JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 38/86

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

BETWEEN GEORGE BECKFORD DEFENDANT/APPELLANT

AND GLORIA CUMPER PLAINTIFF/RESPONDENT

Mr. B. Macaulay, Q.C., & Mr. R. Francis for the Appellant

Mr. S. Shelton instructed by Myers, Fletcher & Gordon, Manton & Hart for the Respondent.

12th June, 23rd October; & 20th November, 1987

CARBERRY, J.A.

This matter was before us last year and due to my own illness our reserved judgments were not ready for delivery until the 12th June, 1987, and that date was duly appointed for its delivery. For the record it may be noted that where all that is at issue is the delivery or handing down of a written judgment, the panel before which it is delivered is not necessarily the same as that which heard the case, but may be any panel sitting on the appointed date and containing one or more of the members of the original hearing panel. If, of course, something more has to be done at the time of delivery or handing down of the written judgment, for example hearing the parties as to costs, then naturally the original panel will be re-constituted for that purpose.

The attorneys of the parties are of course notified in advance of the date on which it is proposed to hand down the written judgment, so that they may be there to receive it and perchance to make any application that they may wish to make. And this was done here. It elicited an unexpected response. On the 11th of June, 1987, the appellant filed a Motion "for leave to adduce fresh evidence." The appellant set

this motion down for hearing on the 12th June, the same date on which the written judgment in the appeal was due to be handed down. In these circumstances the panel that was sitting did not hand down the written judgment, but adjourned the matter to a date at which or on which the original panel could be re-assembled to deal with the new turn of events.

Due to the exigencies of the Court's work load, it was not until the 23rd October, 1987, that the original panel was re-constituted for the hearing of this application. The application was heard on that date, and was dismissed. We promised then to put our reasons in writing and do so now. We therefore deliver today our reasons for the refusal of the application to call further evidence, and also the written judgments in the substantive appeal that were to have been handed down on the 12th June, 1987. This judgment is therefore in a sense a post script to the original judgments in this matter.

Rule 18 of the Jamaican Court of Appeal Rules deals with the general powers of the Court. Rule 18 (2) is in the following terms:

> "18 (2) The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner;
>
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

This then was the power of the Court that was being invoked in the application to call further evidence. The Jamaican rule is for all practical purposes identical with the U.K. Supreme Court Rule set out in Order 59 Rule 10 (2). And so too is 18 (3) of the Jamaican Rules, which reads:

> "18 (3) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

See the U.K. Rules Order 59 Rule 10 (3).

The application to offer further evidence in this case was unique in our experience; it came not merely after the trial below, but after the appeal therefrom had been argued, judgment reserved and in fact judgments prepared for delivery. We have been unable to discover any case in which such an application has been made at so late a stage. When we pointed this out, Mr. Macaulay for the applicant referred us to the recent Privy Council decision in Meng Leong Developments Pte. Ltd., v. Jip Hong Trading Co., Pte. Ltd., (1985) A.C. 511; (1985) 1 All E.R. 120. We have been unable to draw any assistance from this case. While it is true that their Lordships in the Privy Council took note of facts or events which were not known to the Court of Appeal of Singapore, these were (a) evidence as to matters which had occurred after the original trial or hearing, and (b) what was at issue was whether the fact that the plaintiff in a sale of land case who had insisted on the vendor depositing the damages awarded with the plaintiff's attorney had thereby made an election which estopped him from applying for specific performance on the hearing of the appeal. The case was certainly not concerned with anything at all comparable to what the applicant seeks to do in this case.

The novelty of the application is not of course a bar to its success; it is possible to imagine cases in which such an application might succeed, but this is not one of them. What is necessary is to apply to this application the rules and approach that have evolved over the years in dealing with applications of this sort. So far as our own courts go, there was a similar application to call further evidence in The Bustamante Industrial Trade Union v. The Shipping Association of Jamaica (1963) 5 W.I.R. 185; 8 J.L.R. 96. The Court in that case referred to Turnbull v. Duval (1902) A.C. 429 (a Privy Council appeal from Jamaica);

E.H. Lewis & Son Ltd., v. Morelli (1948) 2 All E.R. 1021 (C.A.); Brown v. Dean (1910) A.C. 373 (H.L.) and principally to the judgment of Denning L.J., in Ladd v. Marshall (1954) 3 All E.R. 745; (1954) 1 W.L.R. 1489.. In that case Denning L.J., at page 748 said:

> "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."

Denning L.J.'s formulation was not novel. Very much the same thing had been said in Brown v. Dean (supra) by Lord Loreburn L.C. though he had suggested that the fresh evidence should be such that if believed would be conclusive. Lord Shaw in the same case had been content to say that it must be gravely material, and Denning L.J.'s second test adopts this view. What is clear in all the cases is that it must be shown that the evidence being offered could not have been discovered by the exercise of reasonable diligence before the trial. The note that appears on Order 59 Rule 10 (2) in the 1982 White Book 59/10/8 lists most of the current cases and Ladd v. Marshall is the leading case on this aspect.

Arguing for the reception of the further evidence which the applicant sought to produce, Mr. Macaulay submitted that if the Court of Appeal is presented at any stage before judgment is delivered with evidence which is likely to affect its judgment, it would be the duty of the Court to receive and consider it before delivering its judgment.

It is not necessary to express any final opinion on this proposition. It is sufficient to say that what it does is to seek to give the second and third rule in Ladd v. Marshall priority over the first, which requires the applicant to show that the evidence being offered could not with

reasonable diligence have been obtained before trial. There may be exceptional circumstances in which this may happen, though it is not easy to imagine them. But the first rule has been emphasized in all the cases. Thus in Shedden v. Patrick (1869) L.R. 1 Sc. & Div. 470 at 545 Lord Chemsford said:

> "It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of the parties at the same time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.
>
> If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed to have the case re-tried upon additional evidence which was all the time within their power."

In the same case Lord Colonsay said at page 548:

> "The law does not consider the mere discovery of a document, or the mere discovery of a fact, to be a matter noviter veniens ad notitam, as giving a right to a new trial. It must be a matter not only that was not, in point of fact, before known to the party, but which the party could not by reasonable inquiry, such as he ought to have made, have put himself in possession of."

In Nash v. Rochford Rural District Council (1917) 1 K.B. 384 Scrutton L.J., after citing the passage above from Lord Chelmsford, said at p. 393:

> "I take the reason of it to be that in the interests of the State litigation should come to an end at some time or the other; and if you are to allow parties who have been beaten in a case to come to the Court and say 'Now let us have another try; we have found some more evidence,' you will never finish litigation, and you will give great scope to the concoction of evidence."

He added at p. 395:

> "..... I am not satisfied that by reasonable diligence the plaintiff could not have found this evidence before; and I am not satisfied that when he found it he used reasonable diligence to make it clear that he wanted to upset a finding of the jury which had been obtained in the action."

What then is the situation here? Without rehearsing the judgments to which we have already come, it is sufficient - at the risk of over simplifying the case - to say that we have here a situation in which the Plaintiff had a Registered title by plan to land known as Green Valley estate dated the 14th February, 1924. The title was issued originally in the name of one Reginald Melhado. It also noted that some areas on the plan had been sold to other persons before the title issued. One such area was a piece of land said to be 7 Acres 1 Rood said to be the property of one Garrick Graham. It was marked off on the diagram attached to the Registered title. The Defendant, who claimed to have bought land the title to which was originally owned by Garrick Graham, was alleged by the Plaintiff, who claimed through Melhado and Melhado's transferee in 1925 William Carpenter, to have invaded land falling within her registered title and to have erected thereon various buildings and sheds. In all he seems to have been in possession of some 27 acres. Deducting the 7 acres portion, this meant in effect that Defendant had taken just under twenty acres of the Plaintiff's land. Defendant claimed to have bought this land in 1981, and built on it. Plaintiff commenced action in 1982.

At the trial the Defendant's attempt to establish title failed, but he sought to establish acquisition of the remaining 20 acres by showing adverse possession since the title was issued in 1924. He failed in this also. It is fair to say that the evidence of actual possession from 1925 to the date of action was extremely meagre on both sides, but Plaintiff had the advantage of a registered title.

The new evidence which the Defendant sought to put in was a certified copy of a deed dated 11th April, 1899 purporting to show a transfer of some 39 Acres 1 Rood to Garrick Graham from one Alexander G. Heron and Frances Davis Heron his wife. The transfer was supported by a

plan, but the plan showed a different area, viz some 33 Acres, 2 Roods. The connection, if any, between the vendors of this land and Reginald Melhado or his predecessors was never established. The land covered by this deed was described as part of the Green Valley plantation, and an affidavit by a surveyor put in in support of the Defendant's application purported to link this land with the land covered by the Plaintiff's registered title and the area of 7 Acres 1 Rood admittedly belonging to Garrick Graham.

The Defendant claimed to have come by information leading to the discovery of this deed and plan in the Island Record Office when he visited the Government Land Valuation Office on the 1st June, 1987 (after the appeal had been heard and argued) and there inspected the Cadastral Plan for this area of Jamaica.

The existence of these Cadastral maps is well known to all who practise law and or surveying in Jamaica. Though they do not of themselves prove anything, they are repositories of information as to land titles and surveyed plans and the like, and are valuable as showing which proprietors are neighbours and indicate roughly how their lands relate to each other. A litigant anxious to establish a root of title or to trace land dealings in the area would normally and reasonably ask to inspect the Cadastral maps and follow up any information gleaned from them.

In the circumstances the evidence sought to be tendered was evidence that could with reasonable diligence have been obtained for use at the trial. The first of the conditions laid down in Ladd v. Marshall (supra) has been clearly broken. The importance of that condition appears clearly from cases such as Shedden v. Patrick (supra) Brown v. Dean (supra) and Nash v. Rochford Rural District Council (supra), and of course our own case of Bustamante Industrial Trade Union v. Shipping Association of Jamaica, and also Lewis v. Morelli (supra). For a recent illustration of this principle counsel for the Plaintiff/Respondent, (Mr. Shelton) referred us to the recent English Court of Appeal decision in Ali v. Secretary of State for the Home Department (1984) 1 All E.R. 1009 at 1014.

This was conceded by counsel for the applicant, but he argued, as we have set out above, that despite this there could be cases in which the wider interests of justice might require the Court to depart from the rules dealing with finality in litigation. Even if this were so, this case would not in my opinion fall within such an exception. The evidence sought to be tendered is far from shedding any real light on the dispute in this case. For one thing the grant of the registered title in 1924 would, if the land in this conveyance of 1899 fell within it, have overridden the conveyance, fraud apart; and it would clearly be now impossible at this stage to establish fraud. Further, in so far as the issue fought depended on who was in actual possession, the deed of 1899 would add little or nothing to that evidence.

In short, whether the second test be that of Lord Loreburn in Brown v. Dean (supra) i.e. that the further evidence should be "conclusive", or that of Denning L.J., in Ladd v. Marshall (supra) that the evidence "would probably have an important influence on the result of the case" the evidence of the 1899 deed would not in my opinion qualify under either test. The purchaser's copy was never found. Is there anything to show whether the land to which it related had or had not been sold or transferred elsewhere? Is there anything to connect it up with the Registered Title?

This was a case which ultimately pitted a registered title against an allegation of adverse possession, and in which the evidence of possession and user on both sides was meagre in the extreme. The original parties on both sides had gone to the grave taking their evidence and knowledge with them, and the proprietor of the registered title won. As Lord Loreburn L.C. remarked in Brown v. Dean (supra):

> "When a litigant has obtained a judgment in a Court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds ....."

In these circumstances then we refused the application to call further evidence. There will be costs on this issue to the Plaintiff/Respondent. We further confirm and deliver herewith the judgments prepared for delivery on the 12th June, 1987. The judgment of Harrison J., has been affirmed and the respondent is entitled to her costs both here and below; to be taxed or agreed.

Wright J.A.

I agree.

Bingham J.A. (Ag.)

I agree.