

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2019/0015

BETWEEN:

THE ATTORNEY GENERAL OF GRENADA

Appellant

and

**[1] SHORN BRAVEBOY
[2] LETISHA LESSEY - BRAVEBOY**

Respondents

Before:

The Hon. Dame Janice M. Pereira DBE.
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Dia Forrester, Attorney General, Mr. Darshan Ramdhani, Mrs. Sabrita Khan-Ramdhani and Ms. Caryn Adams for the Appellant
Mrs. Melissa Modeste-Singh for the Respondents

2021: April 14.

Interlocutory appeal — Application to admit fresh evidence — Test for admitting fresh evidence — Whether fresh evidence revealing that nominal amount of judgment debt outstanding at the hearing in the court below should be admitted — Constitutional challenge raised in enforcement proceedings — Whether constitutional challenge raised in enforcement proceedings appropriate where nominal amount of judgment debt outstanding — Disclosure — Duty to disclose material facts to court — Whether court would have entertained a constitutional challenge had the fact that only nominal amount of judgment debt outstanding been disclosed

By order of the court below, the Attorney General of Grenada (“the appellant”) was ordered to pay Shorn Braveboy and Letisha Lessey-Braveboy (“the respondents”) the sum of

\$58,250.00 (“the judgment debt”) together with interest. The respondents filed an application to enforce the judgment debt (“the enforcement application”). At the hearing, the respondents challenged the constitutionality of sections 21(4) of the Crown Proceedings Act (“the Act”) and rules 50.2(3) and 59.7 of the Civil Procedure Rules 2000 (“the constitutional issue”). A judge of the High Court dismissed the respondents’ constitutional challenge, finding that it had to be brought by way of originating motion. The respondents appealed the judge’s decision. The Court of Appeal set aside the judge’s decision and gave directions for the determination of the issue by the court below. The matter was reheard by another judge who granted declarations that section 21(4) of the Act and rules 50.2(3) and 59.7 of the CPR were unconstitutional.

The appellant, being dissatisfied with the decision of the learned judge, appealed. The appellant also made an application to adduce fresh evidence at the hearing of the appeal. The fresh evidence comprised payment vouchers and other documents showing that only \$863.00 remained outstanding on the judgment debt when the matter first came before the Court of Appeal and the court below. At the hearing of the appeal, documentation evidencing the payment of the \$863.00 was also submitted by the respondents and are treated as part of the fresh evidence. The issues which arose for this Court’s determination were: (i) whether the application to adduce fresh evidence should be granted; and (ii) whether the Court should hear and determine the constitutionality issue which engaged the court below in circumstances where the amount outstanding at the time the matter first came before this Court and when it was sent to the court below for determination was almost negligible, and was paid in full by the time this appeal came before us.

Held: granting the application to adduce fresh evidence, including the evidence adduced by the respondents; allowing the appeal; setting aside the declarations made by the learned judge; and making no order as to costs, that:

1. The three limbs of **Ladd v Marshall** must be satisfied before an application to adduce fresh evidence can be granted. In this case, the evidence sought to be adduced by the appellant and the respondent comprising payment vouchers and other documents: (i) could not have been obtained by the appellant with reasonable diligence for use at the hearing in the court below; (ii) would have an important influence on the result of the appeal and (iii) constituted credible evidence such as is presumably to be believed and therefore is pertinent information which should be available to this Court for use in the determination of this appeal.

Ladd v Marshall [1954] 1 WLR 1489 applied.

2. The jurisdiction of the High Court to provide remedies for breaches of fundamental rights and freedoms conferred by the Constitution ought not to be invoked where there are other, less far reaching, avenues for redress available to the party seeking redress under the Constitution. In this case, the respondents raised a constitutional issue on the basis that the state failed to satisfy a judgment debt and certain provisions of the Act and the CPR prohibited enforcement and, therefore, the only

avenue for redress was by way of constitutional challenge. However, during the hearing of the appeal, the Court was informed that only a trivial amount was still due on the judgment debt. In these circumstances, it was neither necessary nor appropriate for a constitutional challenge to have been adjudicated upon by the court.

The Attorney General of Trinidad and Tobago v Siewchand Ramanoop [2005] 2 WLR 1324 applied.

3. A party to civil proceedings before the court is under a duty to disclose all facts which reasonably could or would be taken into account by the court in deciding whether to grant some form of relief. Further, where a party has been in breach of its duty to disclose, especially if it is deliberate, the court would be inclined to setting aside any order made without the benefit of the facts not disclosed. In this case, it would have been highly unlikely that the court below or this Court would have engaged the constitutionality issue had either been aware that the judgment debt had been largely paid off. Accordingly, the orders made by the learned judge declaring section 21(4) of the Act and rules 50.2(3) and 57.9 of the CPR unconstitutional ought to be set aside.

Siporex Trade SA v Comdel Committees Limited [1986] 2 Lloyds Law Report 428 applied.

REASONS FOR DECISION

- [1] **MICHEL JA:** On 14th April 2021, we granted an application by the appellant to adduce fresh evidence (“the fresh evidence application”). The fresh evidence consisted of payment vouchers issued by the Ministry of Finance and other documents evidencing payment by the Government of Grenada to the respondents of a judgment debt in the amount of \$58,250.00, with interest. We granted the application on the basis that the evidence sought to be adduced was evidence that the debt, the enforcement of which was the subject matter of an application in the court below, had been substantially paid. As a consequence of the grant of the fresh evidence application and the resulting admission of the evidence of payment of the judgment debt, the nonpayment of which had led to the making and adjudication of a challenge to the constitutionality of provisions of **the Crown Proceedings Act**¹ of Grenada (“the Act”) and **the Civil Procedure Rules of the**

¹ Cap. 74, Revised Laws of Grenada 2010.

Eastern Caribbean 2000 (“the CPR”), the appeal against the order made by the judge in the court below on the constitutional challenge was allowed without further hearing and the orders made by the judge declaring certain provisions of the Act and the CPR to be unconstitutional were set aside. At the conclusion of the hearing, we indicated to the parties that we would provide written reasons for our decision. The reasons are contained in this judgment.

Background

- [2] By orders dated 4th May 2016 and 27th May 2016, the appellant was ordered to pay to the respondents sums of money totaling \$58,250.00, together with interest which is referred to herein as (“the judgment debt”). By 3rd May 2017, the appellant had not paid the judgment debt, whereupon the respondents filed an *ex parte* application pursuant to Part 50 of the CPR seeking a provisional charging order to garnish the accounts of the appellant at five commercial banks (“the enforcement application”).
- [3] At the hearing of the enforcement application, the respondents challenged the constitutionality of section 21(4) of the Act and rules 50.2(3) and 59.7 of the CPR on the basis that these provisions breached the right to a fair hearing guaranteed by section 8(8) of **the Constitution of Grenada**² (“the constitutionality issue”).
- [4] The judge before whom the enforcement application originally came, made a ruling that a constitutional challenge could not be made within an application for a charging order and had to be brought by way of an originating motion. On appeal to this Court against the judge’s ruling on the constitutionality issue, the Court set aside the judge’s ruling and, by order dated 29th May 2018, gave directions for the determination of the issue. Paragraph 2 of the order required the parties to meet and agree upon the facts and file a statement of agreed facts by 29th June 2018. The significance of paragraph 2 of the order will become apparent in the course of this judgment.

² Grenada Constitution Act (Cap. 128 A)

- [5] On 12th June 2019, another judge, Smith J, heard submissions from both sides on the constitutionality issue and on 12th July 2019 he delivered a written judgment wherein he made the following orders:

“(1) A declaration is granted that section 21(4) of the Crown Proceedings Act is in breach of section 8(8) of the Grenada Constitution and therefore unconstitutional.

(2) A declaration is granted that rules 50.2 (3) and 59.7 of the E.C. CPR are in breach of section 8(8) of the Grenada Constitution and therefore unconstitutional.

(3) No order as to costs.”

The appeal

- [6] The appellant, being dissatisfied with the judgment and orders made by Smith J, filed an application on 19th July 2019 seeking the leave of this Court to appeal. On 24th September 2019, a single judge of this Court granted leave to the appellant to appeal against the judgment and orders of Smith J.
- [7] On 17th October 2019, the appellant filed a notice of interlocutory appeal, together with written submissions and authorities, appealing against the judgment and orders.
- [8] On 23rd October 2019, the respondents filed a notice of opposition to the appeal and on 1st November 2019 they filed written submissions in opposition to the appeal.
- [9] On 12th April 2021, the appellant filed a fresh evidence application. The fresh evidence consisted of payment vouchers issued by the Ministry of Finance and other documents providing proof of payment of the judgment debt by the appellant to the respondents. The application was supported by the affidavit evidence of Robert Branch, Senior Legal Counsel in the Office of the Attorney General. On 13th April 2021, the respondents filed a notice of opposition to the fresh evidence application, together with authorities which they intend to rely on.
- [10] At the scheduled hearing of the appeal on 14th April 2021, this Court first addressed the application to adduce fresh evidence application.

- [11] Relying on the guidelines for adducing fresh evidence as outlined in **Ladd v Marshall**,³ learned counsel for the appellant, Mr. Darshan Ramdhani, submitted that the fresh evidence reveals that full payment of the judgment debt was made to the respondents. He submitted that all three limbs of the **Ladd v Marshall** guidelines were satisfied, and that the application to adduce fresh evidence should therefore be granted.
- [12] In relation to the first limb of the **Ladd v Marshall** guidelines, Mr. Ramdhani submitted that the documents evidencing proof of payment of the judgment debt could not have been obtained with reasonable diligence by the appellant for use in the court below due to a complete breakdown at the time in the accounting and reporting systems in the Ministry of Finance, through which the appellant would have obtained information about payments made towards the judgment debt. Mr. Ramdhani submitted that the evidence confirming the payments only became available to the appellant in April 2021, whereupon the appellant promptly made the fresh evidence application.
- [13] On the second limb of **Ladd v Marshall**, Mr. Ramdhani submitted that if the Court of Appeal had all the material facts before it on 29th May 2018 when it was addressing the constitutionality issue, then it could have been in a better position to properly exercise its discretion to either bring the matter to an end or remit the constitutional question to be determined by the High Court. He also submitted that if the judge in the court below had that information available to him when the constitutional question was before him, it would probably have had an important influence on the outcome of the proceedings.
- [14] On the third limb, Mr. Ramdhani submitted that the documents evidencing payment to the respondents' attorneys-at-law of the proceeds of the judgment debt constituted credible evidence such as is presumably to be believed. He accordingly

³ [1954] 1 WLR 1489.

urged this Court to admit the fresh evidence and to factor it into the determination of the appeal.

- [15] Mr. Ramdhani submitted that the effect of the respondents' application and constitutional challenge was to move the court to declare unconstitutional the statutory restraints to the making of a charging order, placing a charge on all of the bank accounts of the Government of Grenada, in circumstances where the appellant had paid the judgment debt to the respondents months before the matter was heard. He argued that the evidence which the appellant seeks to adduce would demonstrate that the engagement of section 21 of the Act by the issuing of a Certificate of the Registrar proved to be an effective method of securing payment and, further, that the evidence shows that the Court of Appeal was led astray and acted without the necessary jurisdiction when it made the order in May 2018 for the High Court to determine the constitutionality of section 21(4) of the Act and rules 50.2(3) and 59.7 of the CPR. He submitted that if this Court were minded to agree with him on these points, then this is sufficient to dispose of the appeal in its entirety.
- [16] In response to Mr. Ramdhani, learned counsel for the respondents, Mrs. Melissa Modeste-Singh, took issue with the form of the fresh evidence, arguing that the affidavit of Robert Branch setting out the fresh evidence did not comply with rules 30.3(1), (2) and (3) of the CPR. As a consequence, she argued, there is no evidence before this Court which would satisfy the first limb of the **Ladd v Marshall** guidelines. She relied on the cases of **Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and Others**⁴ and **Voaden v Champion**⁵ in support of this submission.
- [17] Regarding the Court's concerns and the queries attendant upon those concerns as to the state of affairs at the time of the enforcement application, Mrs. Modeste-Singh stated that payments had in fact been made towards the debt, but that the receipts

⁴ [1984] 1 All ER 296.

⁵ [2002] All ER (D) 305.

had not illustrated a zero balance and therefore there was still a debt owed to the respondents in May 2018 when the matter first came before the Court of Appeal. Indeed, she relied on correspondence introduced by her side in this appeal which indicated that the final payment of \$863.00 was received by her chambers on 19th July 2019, one week after the delivery of the judgment by Smith J.

Discussion

- [18] Before addressing the reasons for this Court's decision, I wish to make one comment regarding an unsatisfactory aspect of this particular matter. This case highlights the difficulties which a court can encounter when parties flout an order made by the court. Paragraph 2 of this Court's order dated 29th May 2018 directed the parties to file an agreed statement of the facts of the case by 29th June 2018. The purpose of this directive was to create a factual foundation for the court on which it could proceed to determine the constitutional issue raised. This Court's order was, however, disregarded by the parties, thus creating an unsatisfactory state of affairs for both the court below and this Court when they each had to address the constitutionality issue. Compliance by the parties with the directive of the Court would have greatly assisted the court in its determination of the issues, because relevant information relating to payment of or towards the judgment debt would have or should have been known to either or both sides and disclosed to the court.
- [19] I stated earlier that Mrs. Modeste-Singh informed the Court of documentation evidencing final payment of \$863.00 by the appellant to the respondents. This documentation evidencing the payment of the \$863.00, which was submitted to this Court by the respondents, is to be treated as part of the fresh evidence, just as the documentation evidencing payment of almost all of the judgment debt which was submitted to this Court as part of the appellant's application to adduce fresh evidence.
- [20] The reasons why this Court should admit the evidence of payment of the judgment debt, should by now be quite clear. Decisions should be made by courts on actual

facts, and it is imperative that all relevant factual information be placed before the court in order for it to be properly positioned to exercise its discretion. With that said, it is important to bear in mind the context in which this matter came before the courts. It came before the courts on the basis of an enforcement procedure and, therefore, the information as to whether the judgment debt or any part of it was outstanding is pertinent information which the court should be made aware of.

- [21] The relevant starting point in the resolution of this matter is in May 2018 when the Court of Appeal made an order remitting to the High Court the determination of the constitutionality issue and, in so doing, essentially converted the proceedings for the enforcement of a judgment debt into a constitutional claim. The rationale for taking this course of action would no doubt have been to save time and resources in furtherance of the overriding objective and to have the matter be heard on the basis that the law, as it stood, posed serious challenges for judgment creditors in relation to enforcement of judgment debts against the Crown.
- [22] Rules 50.2(3) and 59.7 of the CPR prohibit an attachment of debts order being made against the Crown. Section 21(4) of the Act prohibits this procedure for the enforcement of payments of money or costs by the Crown. Essentially, the respondents' position was that notwithstanding being issued the Certificate of the Registrar under section 21(3) of the Act, these provisions have prohibited their effective enforcement of the judgment debt by restricting their right of access to the court for the enforcement of the judgment debt against the state. Indubitably, this was the understanding of this Court at the material time and the entire premise of the course of action taken.
- [23] The fresh evidence places the matter in an entirely different realm. There are documents which chronicle the payments made in 2017, 2018 and 2019 towards the judgment debt. Payment vouchers dated 26th September 2017 show payments in the sum of \$42,400.00 to the first respondent and \$10,000.00 to the second respondent (less \$8,720.56 as a set off for lands sold by the Government of

Grenada to her). On 2nd October 2017, counsel for the respondents wrote to the appellant's chambers acknowledging receipt of the cheque in the sum of \$42,400.00. In this letter, counsel indicated that this does not represent the full sum due to the first respondent as it omits prescribed costs and interest for one year and four months. By letter dated 20th October 2017, the respondents' counsel informed the appellant that the sum of \$1,279.44 in respect of the second respondent excludes interest in the sum of \$863.00. There was also a reminder for the balance of interest in the sum of \$800.00 for the first respondent.

[24] By another letter dated 14th November 2017, there was a further request for payment of the outstanding interest balances of \$800.00 and \$863.00 to the first and second respondents respectively. I note in this regard, a payment voucher dated 29th January 2018 evidencing payment of \$800.00 in full settlement of the debt to the first respondent.

[25] It appears to have been agreed to by both sides that the payments made by the appellant to the respondents over the period from 26th September 2017 to 29th January 2018 resulted in the sum of \$863.00 being the only amount outstanding on the judgment debt at the time that this matter first came before the Court of Appeal in May 2018 and when it came back before the High Court in June 2019. Payment of the \$863.00 is evidenced by a payment voucher dated 19th July 2019, one week after the delivery of the judgment by Smith J on 12th July 2019.

[26] We agree with Mrs. Modeste-Singh that when this Court made the order remitting the matter to the High Court for determination of the constitutionality issue there was still a lis between the parties and therefore the Court had jurisdiction to hear the matter. However, this does not negate the discretion point raised by the appellant. Based on the evidence, between September 2017 and January 2018, the judgment debt, which was the foundation of the enforcement application, had been almost fully paid. This was information that was sufficiently significant to have been made available to the Court. It was of extreme importance that the Court be informed of

the fact that the amount outstanding at the time that the matter came before it was almost negligible. The availability of this information would have assisted the Court in deciding how to treat with the matter. There was a discretion to exercise and the Court could have, had it been aware of the circumstances as they existed, exercised its discretion to either allow the constitutional point to be decided upon at that stage or (more likely) conclude that payments have been and are being made to the respondents and allow the appellant to continue making these payments.

[27] In any event, a party to civil proceedings before the court is under a duty to disclose all facts which reasonably could or would be taken into account by the court in deciding whether to grant some form of relief. It is no excuse for an applicant to say that he was not aware of the importance of the matters he omitted to state. Indeed, as Bingham J held in the English case of **Siporex Trade SA v Comdel Committees Limited**⁶ “a court should not absolve a defaulting party from the consequences of its neglect”. Where a party, therefore, has been in breach of its duty to disclose, especially if it is deliberate, the court would be inclined to setting aside any order made without the benefit of the facts not disclosed.

[28] In my estimation, it would have been highly unlikely that the Court, knowing what this Court now knows, would have converted an ordinary claim into a constitutional one on an issue of such trifling value. The lack of forthrightness led the Court into making an incorrect assumption about the state of affairs and effectively denied it of the opportunity to consider the matter in the context of the actual facts and circumstances. Indeed, it could be said that the Court was misled into making the determination that it did and in dragging the **Constitution of Grenada** into an arena unbefitting of its status as the supreme law of the land. The High Court too, which dealt with the constitutionality issue remitted to it by the Court of Appeal, might well have resolved the matter differently if it had before it the information now before this Court via an application to adduce fresh evidence.

⁶ [1986] 2 Lloyds Law Report 428 at 437.

[29] Caribbean Constitutions endow the High Court with jurisdiction to provide effective remedies for breaches of fundamental rights and freedoms.⁷ However, this jurisdiction ought not to be invoked where there are other, less far reaching, avenues for redress available to the party seeking to invoke the jurisdiction of the High Court for redress under the Constitution. On this point, I note the salutary counsel of Lord Nicholls of Birkenhead at paragraph 25 of the judgment of the Privy Council in the case of **The Attorney General of Trinidad and Tobago v Siewchand Ramanoop**,⁸ wherein His Lordship stated that:

“In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

[30] In this matter, the respondents raised a constitutional issue on the basis that the state had failed to satisfy a judgment debt and they (the respondents) had been unable to enforce the judgment debt due to the prohibitive nature of the aforementioned provisions of section 21(4) of the Act and rules 50.2(3) and 59.7 of the CPR and, therefore, the only avenue for recourse was by way of a constitutional challenge. As the Court is now aware, this was not the case, and all but a trivial amount was still due on the judgment debt. Accordingly, this was not an appropriate case for a constitutional challenge to have been made and adjudicated upon.

[31] We were satisfied that the guidelines set out in **Ladd v Marshall**, which are still generally used to determine whether fresh evidence should be admitted by a court of appeal, have been met and that the documents produced by the appellant evidencing payments made to the respondents towards the judgment debt and the document produced by the respondents evidencing payment by the appellant of the

⁷ Fundamentals of Caribbean Constitutional Law, para 4-006.

⁸ [2005] 2 WLR 1324.

balance of \$863.00 due on the judgment debt, should be admitted as fresh evidence to be used in the determination of this appeal.

- [32] Having admitted the fresh evidence which confirms that the judgment debt was almost fully paid by the time that the constitutionality issue first came before this Court, and was fully paid within one week of the delivery of the judgment on the constitutionality issue, and having read and listened to the submissions of counsel on both sides, and considered the applicable legislation and relevant cases, we were of the view that the appeal should be allowed and the orders made by Smith J should be set aside.
- [33] Having determined that the appeal be allowed and the orders of Smith J set aside, the question became whether this Court should itself proceed to hear and determine the constitutionality issue which engaged the court below, with the benefit though of the fresh evidence, or whether, having formed the view that the High Court may likely have declined to adjudicate the constitutionality issue had Smith J been aware of the fact that, but for a small amount of interest due on the judgment debt, the debt had been paid in full, the matter should be laid to rest.
- [34] We were of the view that the fresh evidence admitted in this case was sufficiently determinative of the issue in dispute between the parties as to justify not only allowing the appeal and setting aside the orders of Smith J, but also bringing an end to the proceedings between the parties concerning the payment of the judgment debt to the respondents by the Government of Grenada. There was no need therefore for this Court to undertake the academic exercise of adjudicating the constitutionality of provisions of the Act or the CPR which have no bearing on the actual dispute between the parties. The issue of the constitutionality of section 21(4) of the Act and rules 50.2(3) and 59.7 of the CPR should accordingly be left to be determined by another court at another time on an issue of substance justifying the engagement of the High Court in the determination of issues of constitutional significance. Indeed, I will venture to add as an epilogue, that so irrelevant is the

constitutionality issue to the matter which was actually in dispute between the parties, that if this Court had proceeded to hear and determine the constitutionality issue, we may have run the risk of producing a judgment which was devoid of a ratio decidendi and contains only obiter dicta.

[35] For the foregoing reasons, the Court ordered as follows:

- (1) The application to adduce fresh evidence is granted.
- (2) The appeal against the order of Smith J is allowed.
- (3) The declarations and orders made by Smith J on 12th July 2019 declaring that section 21(4) of **the Crown Proceedings Act** and rules 50.2(3) and 59.7 of the **Civil Procedure Rules 2000** are unconstitutional, are set aside.
- (4) No order is made as to costs.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar