

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

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2019/0028

BETWEEN:

**[1] GREGORY GILPIN-PAYNE
[2] INTERNATIONAL INVESTMENTS AND CONSULTING LTD.**

Applicants/Appellants

and

**[1] STEPHEN FIRST
[2] CORPORATE CAPITAL (ASIA) LTD.**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag]

Appearances:

Mr. D. Victor Elliott-Hamilton for the Applicants/Appellants
Ms. Vanessa Fennel for the Respondents

SKBHCVAP2019/0030

BETWEEN:

ADAM BILZERIAN

Applicant/Appellant

and

KEVIN HORSTWOOD

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St.C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag]

Appearances:

Mr. D. Victor Elliott-Hamilton for the Applicant/Appellant
Mr. Terrence V. Byron for the Respondent

SKBHCVAP2019/0031

BETWEEN:

[1] KEYAPAHA INTERNATIONAL LTD
[2] DAN BILZERIAN

Applicants/Appellants

and

[1] LAURA GETZ
[2] ROBERT GETZ
[3] VICTOR DOCHE
[4] VISTAS INTERNATIONAL, LLC

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St.C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag]

Appearances:

Mr. D Victor Elliott-Hamilton for the Applicants/Appellants
Ms. Renal Edwards holding papers for Ms. Angelina Sookoo-Bobb holding a
watching brief for the third Respondent

SKBHCVP2019/0032

BETWEEN:

**[1] ADAM BILZERIAN
[2] LEMON GROVE COMPANY LIMITED
[3] CARIBBEAN BUILDINGS SYSTEMS (ST. KITTS) LTD.**

Applicants/Appellants

and

**[1] TERRENCE V. BYRON
[2] BYRON & BYRON
[3] KEVIN HORSTWOOD**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag]

Appearances:

Mr. D. Victor Elliott-Hamilton for the Applicants/Appellants
Mr. Terrence V. Byron in person and for the Second and Third Respondents

SKBHCVA2019/0033

BETWEEN:

ADAM BILZERIAN

Applicant/Appellant

and

**[1] GERALD LOU WEINER
[2] KATHLEEN WEINER**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St.C Farara, QC

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag]

Appearances:

Mr. D. Victor Elliott-Hamilton for the Applicant/Appellant
Ms. Jean Dyer for the Respondents

2020: June 8;
July 21.

Applications to admit fresh evidence — Refusal by judge to recuse himself — Principles in Ladd v Marshall — Application of Ladd v Marshall principles to interlocutory applications – Whether applicants can rely on events and documents coming into existence after judge’s refusal to recuse himself as fresh evidence in satisfaction of first limb in Ladd v Marshall — Whether applicants satisfied the second limb in Ladd v Marshall — Whether court can grant leave to rely on a judgment and orders of the lower court without a transcript of the proceedings — Whether in all the circumstances the court ought to grant the application to admit fresh evidence to give effect to the overriding objective to do justice

These matters concern five applications to admit three documents as fresh evidence at the hearing of the interlocutory appeals in each of the five listed matters. The documents are: (i) the judgment of Ventose J made 14th October 2019 in SKBHCV2012/0154 – Gerald Lou Weiner and Kathleen Ann Weiner v Adam Bilzerian; (ii) the order made by Ventose J on 31st October 2019 in SKBHCV2016/0082 – Stephen First and Corporate Capital (Asia) Limited v Gregory Gilpin-Payne and International Investments & Consulting Limited; and (iii) the order made by Ventose J on 30th January 2019 in SKBHCV2017/0072 – Adam Bilzerian, Lemon Grove Company Limited, and Caribbean Building Systems (St. Kitts) Ltd v Terence V. Byron, Byron & Byron and Kevin Horstwood (“the documents”).

Each of the appellants/applicants filed a separate application to rely on the documents as fresh evidence in the interlocutory appeals. However, by consent, the Court heard oral argument and submissions from counsel for the parties in only the application filed in SKBHCV2019/0033, as all five applications concerned the same issues of law and fact and were in substance identical. The parties also agreed that the hearing of the application in SKBHCV2019/0033 would be dispositive of the applications in all five matters.

The applicants argued that the documents sought to be adduced as fresh evidence were necessary to support their appeals which challenged the decision of Ventose J, made on 25th July 2019, dismissing two applications for him to recuse himself. The applicants argued that the documents satisfied the principles in *Ladd v Marshall* [1954] 3 All ER 745

(“the Ladd v Marshall principles”) for the admission of fresh evidence in that they: (i) could not have been obtained with reasonable diligence for use at the hearing of the recusal applications; (ii) would probably have an important influence on the result of the recusal applications; and (iii) were clearly credible evidence. Based on these principles, the applicants submitted that they ought to be allowed to rely on the documents at the hearing of their appeals.

The respondents in SKBHCVA2019/0033 opposed the application on the ground that the second limb of the Ladd v Marshall principles was not satisfied, having conceded that the first and third limbs had been met. The respondents submitted that: (i) the court could not consider the cumulative effect of the documents in deciding whether they point to evidence of apparent bias on the part of the learned judge; and (ii) the court could not properly consider these documents without more, specifically, without the benefit of the transcripts of the proceedings below.

Held: allowing the applications to admit fresh evidence in all five matters; and directing the filing of written submissions on costs within 7 days of the date of the judgment, that:

1. The criteria in **Ladd v Marshall** for the admission of fresh evidence are principles and not special rules to be strictly applied by the court. It is no longer necessary for an applicant to show some special ground for the grant of permission to rely on fresh evidence upon the hearing of an appeal. They are principles which must be broadly applied, but relaxed in appropriate cases to give effect to the overriding objective of the court to do justice. This is especially so when considering an appeal from a decision on an interlocutory application. However, an applicant must produce strong grounds to merit the appellate court exercising its discretion in its favour. Accordingly, these being appeals from a decision on interlocutory applications, are appropriate case in which the principles for adducing fresh evidence set out in **Ladd v Marshall** should be applied in a more flexible and relaxed manner.

Hertfordshire Investments Ltd v Bubb [2000] 1 LR 2318 applied; **Langdale and Another v Danby** [1982] 1 WLR 1123 applied; **Star News Shops Ltd v Stafford Refrigeration Ltd** [1998] 1 WLR 536 applied; **Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary representative for Castries South East) v The Constituency Boundaries Commission et al** SLUHCVA2015/0013 (delivered 1st October, 2015, unreported) applied.

2. As to the first limb of the **Ladd v Marshall** principles, that the evidence which is sought to be adduced at the appeal stage must be evidence which could not have been obtained with reasonable diligence for use at the hearing below, fresh evidence is not limited to evidence which was in existence at the time of the hearing in the court below, but also includes evidence which came into existence subsequent to the hearing below. Accordingly, the documents satisfy the first limb of the **Ladd v Marshall** principles.

Staray Capital Limited and another v Cha, Yang (also known as Stanley)
[2014] ECSCJ No. 172 applied.

3. There is no rigid rule or principle that, absent the transcripts of the hearing below, an appellate court must refuse an application to rely on a judgment and/or orders of a lower court as fresh evidence. The fundamental principle is that an application to adduce fresh evidence must satisfy the **Ladd v Marshall** principles which are to be approached in a somewhat relaxed or less rigid manner in the instant appeals from interlocutory applications. In doing so, the court must consider all relevant factors, including the cumulative effect of the judgment and orders sought to be admitted as fresh evidence upon the hearing of these appeals.
4. The argument by the respondents in SKBHCVAP2019/0033 that the documents ought not to be admitted as fresh evidence because those respondents were not parties to the proceedings in which the judgment and orders were made and, hence, would be at a disadvantage or would be prejudiced upon the hearing of the appeal, is not correct. The fundamental issue, which is not in dispute, is whether the documents are credible evidence, and whether, taken individually or in combination with other evidence, they would probably have an important influence on the result of the recusal applications.
5. In deciding whether the appellants have satisfied the second limb of the **Ladd v Marshall** principles, that the evidence sought to be adduced would probably have an important influence on the result of the hearing below, this Court is entitled, and ought to consider, whether the documents, when considered individually or weighed cumulatively, in combination with each other or with other admissible evidence, would tend to show, to the informed fair-minded observer, a lack of fairmindedness or apparent bias on the part of the learned judge.

Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd
[2012] UKPC 41 applied.

6. The documents sought to be relied on by the applicants satisfied the second limb of the **Ladd v Marshall** principles in that, when they are considered objectively and in the light of the Court's overriding objective to do justice between the parties, they would probably have had an important influence, as distinct from a definitive influence, on the outcome of the recusal applications. These documents which, inter alia, speak to prohibiting Mr. Paul Bilzerian from appearing and making representations for and on behalf of parties in these five matters, can be utilised to buttress the applicants' case that the learned judge probably lacks the impartiality or fairness necessary to continue to preside over and to determine issues in relation to these five matters before the High Court of Justice. In this court's view, the justice of these matters requires that the applicants be permitted to rely on the documents as fresh evidence at the hearing of their respective appeals from the order of the learned judge refusing to recuse himself.

Ladd v Marshall [1954] 3 All ER 745 applied; **Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd** [2012] UKPC 41 applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is the judgment of this Court on the five separate applications filed on 9th March 2020 by the respective appellants (“the Fresh Evidence Applications”), by which the applicants sought the permission of the Court to rely on the same three documents as fresh evidence (“the Fresh Evidence Documents”), upon the hearing of their respective interlocutory appeals against the decision of the Hon. Justice Eddy Ventose made on 25th July 2019. The decision of Ventose J dismissed two applications filed on 13th March 2019 and 31st May 2019 respectively (“the Recusal Applications”) which sought orders that the learned judge recuse himself from the lower court proceedings concerning these five matters.
- [2] It is common ground that each of these applications rely on the same grounds and concern identical legal issues for determination by this Court. Accordingly, and with the consent of the respective parties to each matter, the Fresh Evidence Applications were heard together. In doing so, it was accepted by counsel for the parties in each of these five matters that, for convenience and the most efficient use of the Court’s time, the Court would hear oral argument with respect to the fresh evidence application in SKBHCVAP2019/0033 only, and that its decision thereon would be dispositive of all five applications to admit fresh evidence. Accordingly, the Court heard argument on the application in SKBHCVAP2019/0033 from Mr. Elliott-Hamilton, learned counsel for the applicant, Adam Bilzerian, and from Ms. Jean Dyer, learned counsel for the respondents, Gerald Lou Weiner and Kathleen Weiner. The respondents in that matter had filed a notice in opposition and an affidavit in opposition to the application to adduce fresh evidence, along with written submissions.

Background

- [3] Mr. Paul Bilzerian, is the father of the applicants, Adam Bilzerian and Dan Bilzerian, and has represented them on various occasions at various stages of the proceedings in these matters, both before the High Court and the Court of Appeal. He has purported to do so pursuant to the terms, and by virtue of, a power of attorney granted by each of his said sons, and also in his capacity as a director of certain companies which are parties in certain of the five proceedings. It is apparent from the order made by Ventose J on 25th July 2019, and the written reasons provided by the learned judge on 14th October 2019, that Mr. Paul Bilzerian has, over the years, filed on behalf of his sons Adam and Dan and the corporate parties of which he Paul Bilzerian is a director, other unsuccessful applications for various judicial officers to recuse themselves.
- [4] When Ventose J dismissed the Recusal Applications, his dismissal was set out in a detailed order dated 25th July 2019 which encapsulated some of his reasoning and basis for the dismissal, including references to and extracts from certain decided cases. The learned judge also subsequently referred to his dismissal of the Recusal Applications at paragraph 9 of one of two written judgements delivered by him on 14th October 2019. That said, the judgment delivered by the learned judge in SKBHCV2015/0154 (mistakenly headed SKBHCV2015/0088) which also dealt with his disposal of other interlocutory applications in SKBHCV2015/0154, is one of the three documents sought to be adduced and relied upon as fresh evidence in the hearing of the interlocutory appeals before this Court against the said dismissal order of 25th July 2019.
- [5] More detailed reasons for dismissing the Recusal Applications were given in a judgement pertaining to some seven (7) listed matters, which included SKBHCV2015/0154 and SKBHCV2015/0088. This is the other written judgment handed down by Ventose J on 14th October 2019. The learned judge's analysis and reasoning is at paragraphs 29 to 46 of that judgment. Copies of the order of

25th July 2019 and both of the written judgments of 14th October 2019, were filed by the applicants.

- [6] Leave to appeal the dismissal of the Recusal Applications was granted by a judge of this Court on 12th July 2019. The respective notices of interlocutory appeal filed by each of the applicants on 5th March 2020 are yet to be heard and determined on their merits. However, in determining the Fresh Evidence Applications, we are mindful that in granting leave to file the interlocutory appeals, a judge of this Court was satisfied that each of the interlocutory appeals has a reasonable (as opposed to a fanciful) prospect of success.
- [7] It must be pointed out that copies of the Recusal Applications and the supporting affidavit evidence before the court below, were not part of the appeal record put before us for the hearing of the Fresh Evidence Applications. This omission is to be deprecated. While this Court is not called upon to determine, at this stage, the issues raised in the interlocutory appeals on their merits, it was important to put before us the very applications and evidence which were considered and dismissed by the learned judge. This becomes even more important, as will be alluded to later in this judgment, because of the way in which learned counsel Mr. Elliott-Hamilton for the applicants had, in argument before us, presented the case for the applicants. In short, the applicants placed great emphasis on the ‘cumulative effect’ of each piece of evidence sought to be relied on, including the ‘fresh evidence’ documents¹ and the evidence relied on before Ventose J, specifically as it pertains to them being able to satisfy the second limb or criterion in **Ladd v Marshall**,² and their reliance on the decision of the Privy Council in **Marie Joseph Charles Robert Lesage v The Mauritius Commercial Bank Ltd.**³

¹ See para. 15 of the applicants’ written submissions.

² [1954] 3 All ER 745.

³ [2012] UKPC 41.

The Fresh Evidence Applications

- [8] The applications as filed sought two reliefs. The first is a stay of the proceedings in the court below until the determination of the interlocutory appeals filed in each matter. By order of Thom JA, a single judge of this Court, dated 19th May 2020, this relief was granted, and a stay was imposed pending the outcome of the interlocutory appeals.
- [9] The second relief seeks the permission of this Court to adduce or to rely on fresh evidence during the hearing of each interlocutory appeal. This limb of the applications was, by order of Thom JA, put for the hearing and determination of the Full Court. By way of the second prayer of relief, each of the applicants seek to rely on three documents. These are:
- (1) The judgment of Ventose J delivered on 14th October 2019 in SKBHCV2012/0154 – Gerald Lou Weiner and Kathleen Ann Weiner v Adam Bilzerian;
 - (2) The order made by Ventose J on 31st October 2019 in SKBHCV2016/0082 – Stephen First and Corporate Capital (Asia) Limited v Gregory Gilpin-Payne and International Investments & Consulting Limited; and
 - (3) The order made by Ventose J on 30th January 2019 in SKBHCV2017/0072 – Adam Bilzerian, Iemon Grove Company Limited, and Caribbean Building Systems (St. Kitts) Ltd v Terence V. Byron, Byron & Byron and Kevin Horstwood.
- [10] The said written judgment and orders were made by the learned judge in three separate matters. Importantly, they were all delivered or made on dates subsequent to the decision of Ventose J on 25th July 2019 dismissing the Recusal Applications.

- [11] Each of the Fresh Evidence Applications is supported by an affidavit of Mr. Paul Bilzerian, who deposes that he is making the affidavit in his capacity as “attorney in fact” for the applicants, Adam Bilzerian or Dan Bilzerian (as the case may be), or as a director of each of the applicant companies, Lemon Grove Company Limited, Caribbean Building Systems (St. Kitts) Ltd, International Investment and Consulting Limited and Keyapaha International Ltd (as the case may be). Each of the supporting affidavits are in substantively identical terms and rely on the same grounds and documents. Furthermore, the written submissions of the applicants on the law and the facts and the legal authorities relied upon by each applicant with respect to the Fresh Evidence Applications, are identical.
- [12] It is to be observed that the applicants do not seek to rely on the transcript of any of the proceedings in the court below giving rise to the said judgment or orders.

The Documents

A. The Written Judgment – 14th October 2019

- [13] The judgment of 14th October 2019 sought to be admitted as fresh evidence, was handed down by Ventose J in claim no. SKBHCV2015/0154 – Gerald Lou Weiner and Kathleen Weiner v Adam Bilzerian. It dealt with various applications filed, respectively, by the claimants and the defendants. It, at paragraph 9, records that the learned judge dismissed the recusal applications on 25th July 2019 and provided his reasons on 14th October 2019.
- [14] In the dispositive part of that written judgment, the learned judge refused two applications filed by the defendant to that matter, Adam Bilzerian. The first was to set aside a judgment given in his absence, and the second had sought a stay of execution of the said judgment pending the decision on the set aside application. The learned judge also made an order directing the Registrar of Lands to execute on behalf of the defendant (the claimants having already obtained judgment in that case) a memorandum of mortgage within 7 days, the defendant having not executed the said memorandum of mortgage as ordered to by the court.

[15] As regards the refusal of the set aside application, the applicants complain that this was done summarily by the learned judge “without citation of authority or consideration on the merits”. They rely on paragraph 4 of the judgment in support of this assertion, and say that the learned judge got it entirely wrong when he said therein that the application to set aside the judgement made in the absence of a party was not signed by the party to the proceedings (Dan Bilzerian), but by his father, Paul Bilzerian, who represented him in the proceedings under the power of attorney.⁴ Paragraph 4 of the said judgment reads:

“...The application must fail because, first, the application was not made by the party to the proceedings, the defendant, Mr. Adam Bilzerian, but made by Mr. Paul Bilzerian; and second, the affidavit sworn was not by a party, the Defendant, Mr. Adam Bilzerian but sworn by Mr. Paul Bilzerian. The application to set aside the judgment given in a party’s absence is hereby dismissed.”

[16] The learned judge at paragraph 10(4) of the said judgment also made an order that unless the defendant files and serves, within 7 days, evidence that he has complied with certain listed costs orders of the court, “the Defendant shall not make any application or take any steps in these proceedings without first obtaining the permission of the court”.

B. Order dated 31st October 2019

[17] This order was made by Ventose J in SKBHCV2016/0082 – Stephen First and Corporate Capital (Asia) Limited v Gregory Gilpin-Payne and International Investments 7 Consulting Ltd. The order was made on an application for an extension of time to file witness statements and for relief from sanctions. The learned judge struck out the defence of the second defendant, International Investments & Consulting Ltd. He granted an extension of time and relief from sanctions to both the claimants and the first defendant in those proceedings. The judge also made a suite of orders and directions as to the filing of certain documents leading up to or in preparation for the trial of the matter.

⁴ See paras.3.2 and 3.3 of the notice of application to admit fresh evidence; para. 4 of the affidavit of Paul Bilzerian filed in support of the Fresh Evidence Application; and paras. 9 and 10 of the applicants’ written submissions.

- [18] The applicants complain that the learned judge struck out the second defendant's defence on the ground that the said company was not represented by a lawyer.⁵ This, they say, was because on 17th October 2019, the learned judge had made an order prohibiting Mr. Paul Bilzerian from representing the same company in another matter, when in fact Paul Bilzerian is a director of International Investments & Consulting Ltd and was entitled, pursuant to rule 22.3 of the **Civil Procedure Rules 2000** ("CPR"), to represent the company in any legal proceedings. Again, it was submitted by the applicants that this order was evidence indicative of an apparent bias on the part of the learned judge against the said applicant company and its director Paul Bilzerian.

C. Order dated 30th January 2020

- [19] This order was made in SKBHCV2017/0072 – Adam J. Bilzerian, Lemon Grove Company Limited and Caribbean Building Systems (St. Kitts) Limited v Terrence V. Byron, Byron & Byron and Kevin Horstwood. A compendium of seven orders was made at a status hearing. The complaint by the applicants relate, specifically, to paragraph 1 of the order which states:

"Unless both Mr. Adam Bilzerian and the Second and Third Claimants are represented by Attorneys at Law on the next adjourned date, the Statement of Claim shall be Struck Out Without Further Order of the Court."

- [20] The applicants complain that this order flies in the face of the clear language of CPR 22.3 whereby, Mr. Paul Bilzerian, as a director of each of the second and third claimant companies, is entitled to represent them in the said proceedings.
- [21] At paragraph 13 of the affidavit of Paul Bilzerian in support of the Fresh Evidence Applications, he deposes that the making of the unless order by the learned judge was "on his own initiative, as no application was made by any party seeking an unless order". He sets out in full the last recital to the said order,

⁵ See para. 3.4 of the Fresh Evidence Applications and para. 7 of the affidavit of Paul Bilzerian in support of the said application.

where the learned judge records that the representation of Mr. Adam Bilzerian by Mr. Paul Bilzerian:

“amounts to an abuse of the court’s processes, the court is minded to grant an order that unless both Mr. Adam Bilzerian and the Second and Third Claimants be represented by attorneys at law on the next adjourned date, the Statement of Claim shall be struck out....”

[22] Mr. Paul Bilzerian⁶ also deposes that the learned judge had not given him any opportunity to be heard on how he had been conducting matters before the court and how his conduct of those matters had amounted to an abuse of the court’s process. He concludes by stating:

“[a]t no point did Justice Ventose indicate that he was minded to enter an unless order in the terms sought. The order was simply made during the course of giving his directions on the Applications to Strike and Applications for Discharge of the Injunction and was made without any discussion by the learned judge or any party.”

[23] The applicants rely on these three documents as further evidence indicative, either singularly or cumulatively, and together with other documentary evidence, of unfairness or apparent bias on the part of the learned judge against Mr. Paul Bilzerian and his representation of Mr. Adam Bilzerian and the corporate parties of which Mr. Paul Bilzerian is a director, in relation to all five of these proceedings.

[24] The gravamen of the applicants’ complaints is summarised at paragraphs 16.1 to 16.7 of their written submissions filed on 9th March 2020. In summary, they are:

- (1) Each of the orders are relevant to the issues before the court. Each order would be viewed by a fair-minded observer as indications of apparent bias on the part of Ventose J;
- (2) The learned judge by his order of 14th October 2019, pre-determined the application to set aside the judgment, without assessing it on

⁶ See para. 14 of his affidavit in support of the application.

the merits, dismissing summarily for clearly erroneous reasons that cannot be justified;

- (3) In relation to the orders made on 31st October 2019 and 30th January 2020, Ventose J adopted the position, that Mr. Paul Bilzerian should not be involved in any capacity in any matters before him;
- (4) In the circumstances the orders afford additional grounds in support of the appellants' application for an order that Ventose J be recused from hearing any further applications on the ground of apparent bias;
- (5) Each of the orders referred to in paragraph 2 are "fresh" evidence having been made after the judge determined the application for recusal; and
- (6) It is consistent with the overriding objective that the evidence be admitted for a fair hearing of the appeal.

The Law

[25] It is well established that the court's power to permit a party to adduce further or fresh evidence on the hearing of an appeal from a decision of a lower court falls under the court's inherent jurisdiction. It is a discretionary power and, hence, one which must be exercised judicially and in accordance with what are well-settled principles. These principles have been authoritatively considered and formulated in the case law. The most cogent formulation of these principles is in the judgment of Denning LJ in the seminal case of **Ladd v Marshall**. In that case, Lord Denning determined that to justify the reception of fresh evidence three conditions must be satisfied by an applicant. These are:

- (1) First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

- (2) Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and
- (3) Thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible.

[26] These 'conditions' have become known as 'the **Ladd v Marshall** principles'. They have been followed and applied by courts in many common law jurisdictions. However, these principles or criteria have been developed somewhat from when **Ladd v Marshall** was decided in 1954. This has taken place in two important respects. Firstly, it is now clear that the **Ladd v Marshall** principles are to receive a somewhat more relaxed application when treating with appeals from interlocutory matters, as distinct from when treating with an appeal from a decision of a court after a trial on the merits. This relaxation in the application of the **Ladd v Marshall** principles in interlocutory appeals is for sound reasons. Where there has been a trial on the merits with witnesses, a more stringent approach is warranted by the appellate court when considering an application by a party to adduce on appeal further or fresh evidence not relied upon in the court below. In such circumstances, an appellate court ought to apply the **Ladd v Marshall** principles with their full import and vigour, since the parties have a clear duty to fully and completely prepare for and to deploy their full case at trial covering or addressing all the relevant factual and legal issues in dispute between the parties.

[27] However, courts have recognised since the decision in **Ladd v Marshall**, that a more flexible or relaxed approach is called for, in the interest of justice, when dealing with applications to adduce fresh evidence in an appeal from a decision on an interlocutory application or an application which was not decisive of the merits of the matter. This is considered prudent because the level of diligence required in dealing with such an application is very different to that required when

preparing for a trial. As much has been expressed by Lord Bridge in **Langdale and Another v Danby**,⁷ see also **Star News Shops Ltd v Stafford Refrigeration Ltd**.⁸

- [28] Clear authority for this ‘relaxed’ approach is found in the decision of this court in **Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary representative for Castries South East) v The Constituency Boundaries Commission et al**.⁹ In the judgment of the Court, delivered by Pereira CJ, the learned Chief Justice reviewed extensively some of the more recent English authorities on the differential treatment when dealing with interlocutory applications as opposed to a full trial on the merits, and concluded at paragraph 8 as follows:

“Other judicial authorities of more recent vintage suggest however, that in relation to interlocutory applications on appeal, the strict principles set out in **Ladd v Marshall** are relaxed as the courts seek to give effect to the overriding objective in circumstances where the issues between the parties are yet to be fully determined on their merits.”

- [29] The second development of significance in the application of the **Ladd v Marshall** principles, is that they are just that, ‘principles’, and not strict or special rules to be rigidly applied by an appellate court when deciding whether or not to permit a party to rely on further or fresh evidence on an appeal. They are principles, not rules, which must be applied broadly, but relaxed, in appropriate cases, having regard to the overriding objective to do justice.
- [30] Most importantly, it is no longer necessary to establish or to show some ‘special ground’ for the grant of permission to rely on fresh evidence. Accordingly, while an applicant must produce strong grounds to merit the appellate court exercising its discretion to admit further or fresh evidence not relied on at the hearing below, the bottom line is whether, in all the circumstances, it is in furtherance of the overriding objective to do justice to permit a party, at the hearing of the appeal,

⁷ [1982] 1 WLR 1123.

⁸ [1998] 1WLR 536.

⁹ SLUCHCVAP2015/0013 (delivered 1st October, 2015, unreported).

to rely on evidence which was not before the lower court. This is especially so when dealing with an appeal from a decision on an interlocutory application or matter not determinative of the claim before the lower court.

- [31] In seeking to do justice between the parties, an appellate court must approach the matter with considerable care to determine whether the **Ladd v Marshall** principles, or any of them, have been fulfilled. If the evidence was clearly available at the trial or at the hearing of the interlocutory application the subject of the appeal, this may well be a decisive reason for refusing the application, albeit a more relaxed approach to the application of this first principle may be warranted in an appeal from an interlocutory application. Hale LJ (as she then was) put it this way in **Hertfordshire Investments Ltd v Bubb**:¹⁰

“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.

...

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 ...”

- [32] With those cautionary words, I now turn to a consideration of the grounds of the Fresh Evidence Applications; whether the applicants have satisfied the **Ladd v Marshall** principles; and whether the justice of the case requires that the applicants be permitted to rely on the Fresh Evidence Documents.

Application of the Ladd v Marshall Principles

- [33] In her written submissions before this Court, learned counsel for the respondents, Ms. Jean Dyer, submitted that the applicants have failed to satisfy the first and second limbs of the **Ladd v Marshall** principles. As to the first limb, Ms. Dyer

¹⁰ [2000] 1 LR 2318 at p. 2325.

submitted that since the three documents came into existence after the hearing on 25th July 2019, they could not be considered ‘fresh evidence’. In her view, ‘fresh evidence’ relates to evidence which was in existence at the time of the hearing below, but which, for whatever reason, was not known to or not available to the applicants with reasonable diligence. However, at the hearing before us Ms. Dyer, quite correctly, conceded that this did not represent the correct legal position. In this vein, she drew attention to this Court’s decision in **Staray Capital Limited and another v Cha, Yang (also known as Stanley)**,¹¹ where Thom JA, at paragraph 25 of the judgment, ruled that documents which came into existence subsequent to the delivery of the judgment which was subject to appeal, could be admitted as fresh evidence in the appeal notwithstanding that they did not exist at the time of the judgment below.

- [34] Likewise, no issue has been raised (also quite correctly) as to the applicants not having satisfied the third principle or criterion in **Ladd v Marshall**. These three documents being quintessentially a judgment and two orders of the court, are clearly credible evidence.
- [35] Accordingly, the success of the Fresh Evidence Applications turns on whether the second limb in **Ladd v Marshall** has been satisfied by the applicants, and whether permission to rely on the said documents or any of them during the hearing of the interlocutory appeals, gives effect to the overriding objective of the Court to do justice between the parties. This Court must therefore objectively answer this primary question: “Would these three documents sought to be relied on, taken singularly or cumulatively with each other, or in combination with other evidence relied on by the applicants in the Recusal Applications before the court below on 25th July 2019, ‘probably have an important influence on the result’ of the said applications?”. In answering this question, this Court must be cognizant that each of the three documents need not be decisive of the Recusal Applications.

¹¹ [2014] ECSCJ No. 172.

[36] This question must be answered within the context of applications for a judge to recuse himself on the ground of apparent bias, where the test to be applied is itself an objective one. That test is whether the notional fair-minded observer, with knowledge of all the relevant facts, would conclude that there is a real possibility that the judge would be biased. That test was authoritatively stated by Lord Hope in the House of Lords in **Porter v Magill**;¹² which was cited by the England and Wales Court of Appeal in **AWG Group Ltd and another v Morrison and another**.¹³ This question must also be answered against the overarching consideration and duty of the Court to do justice between the parties, and in light of the fact that leave to appeal the 25th July 2019 dismissal orders has been granted to the applicants.

Would the Fresh Evidence Documents have had an important influence on the outcome of the Recusal Applications?

[37] It must be noted that the documents now sought to be relied upon as fresh evidence could not have been before the learned judge for his consideration on 25th July 2019 when he decided the Recusal Applications, since the judgment and orders were all made by him subsequent to his decision the subject of the interlocutory appeals. However, as mentioned above at paragraph 33 of this judgment, in the context of the first limb of the **Ladd v Marshall** principles, an appellate court is nevertheless entitled, at this stage, to consider these documents as fresh evidence to be relied upon during the hearing of the interlocutory appeals. They relate to the subsequent actions of the learned judge in relation to some or the same parties, and in relation to the conduct of the proceedings in the same matters.

[38] The applicants rely both on the individual fresh evidence documents and on their cumulative effect, or potential cumulative effect, in submitting that they have

¹² [2001] UKHL 67.

¹³ [2006] 1 WLR 1163.

satisfied the second criterion in **Ladd v Marshall**. In this regard, they rely on the decision of the Privy Council in **Lesage v Mauritius Commercial Bank Ltd**.

[39] Learned counsel for the respondents, Ms. Dyer, submitted that the applicants have failed to satisfy the second **Ladd v Marshall** criterion. She argued that the applicants have not put before this Court any authority to substantiate their contention that the Court can look at the cumulative effect of the documents sought to be relied on, and that neither of these documents on their face point to evidence of apparent bias on the part of the learned judge. She further argued that these matters are distinguishable from the position in **Lesage**, where reliance was placed on exchanges between the judge and counsel in the transcript of the proceedings and not simply, as here, on orders of the court. Accordingly, counsel submitted, this Court cannot properly consider these three documents without more, specifically, without the benefit of the transcripts of the proceedings below.

[40] Ms. Dyer submitted further, that the respondents in SKBHCVA2019/0033 would be at a disadvantage and would suffer prejudice were this Court to permit the applicants to be able to rely on the Fresh Evidence Documents at the hearing of the interlocutory appeals, since these respondents were not parties to any of the proceedings in which the judgment and orders were given.

[41] For the reasons set out below, I respectfully do not agree with these submissions made by learned counsel for the respondents.

[42] As to the ability of the applicants to rely on the cumulative effect of these documents, the following passages from the opinion of Lord Kerr in **Lesage** are apt:

“41. Despite the Board’s misgivings about the way in which the request for more time was handled, this is alone unlikely to have provided a sufficient basis for concluding that an appearance of unfairness or bias on the part of the court existed. **It must be weighed with the other matters canvassed on behalf of the appellant, however, in order to decide**

whether such an appearance of unfairness or bias arises from the cumulative effect.

...

44. Taken in isolation and out of context, these exchanges between Mr. Hurhangee and the court appear unseemly and somewhat demeaning to counsel...It would be difficult to misjudge the tone of the instructions given by the bench from a consideration of the transcript, without actually hearing how the court addressed counsel. The Board is not prepared to hold, on the basis of these exchanges alone, that what passed between Mr. Hurhangee and the court would inevitably produce the appearance of unfairness or bias. **Once again, however, they must be considered in combination with other matters in an overall assessment of whether such an appearance was created.**" (Emphasis added)

[43] It is pellucid from these passages that documents and evidence relied on by an applicant to show a lack of fairmindedness or bias on the part of a judicial officer, may be considered on their individual strength or cumulatively or in combination with other such evidence. This is the approach which the applicants have contended for in prosecuting their applications. In my opinion, it is not only a permissible approach, but the correct one for this Court to adopt in order to determine whether the applicants have satisfied the second criterion in **Ladd v Marshall**.

[44] Furthermore, the decision in **Lesage** does not support the proposition advocated by learned counsel for the respondents that a court cannot permit a party to an appeal to rely on orders and judgments of the court below as fresh evidence, unless they are accompanied or buttressed by the transcripts of the proceedings below pertinent to the making of the orders, or relevant to an allegation of apparent bias or unfairness.

[45] I am of the considered view that each application to rely on further or new evidence must be decided on its merits, within the **Ladd v Marshall** principles, and in the context of the overriding objective to do justice between the parties. While it is most desirable where reliance is being placed by an appellant on

judgments and orders of the lower court, for the transcripts of the proceedings which underpin the making of such orders and the rendering of the judgment to be part and parcel of an application to rely on fresh evidence, each such application must be considered on its merits absent a request by the applicant to also rely on the transcripts of the proceedings below, if available.

[46] Accordingly, there is no hard and fast or rigid rule or principle of law that, absent the transcripts, an appellate court must deny an application to rely on a judgment or order of the lower court in support of an application for the judge to recuse himself for unfairness or apparent bias. The fundamental principle is that an applicant must satisfy the **Ladd v Marshall** principles which are to be approached or applied in a somewhat relaxed way in the instance of an appeal from an interlocutory order. In doing so, the appellate court must consider all the relevant factors including, and especially so, whether the documents which the applicant seeks to have permission to rely on, either singularly or cumulatively with each other or in combination with other evidence relied on in the court below, would probably have an important influence on the result of the application for the judge to recuse himself. What **Lesage** illustrates is that in deciding whether to admit certain matters as fresh evidence, each piece of evidence sought to be relied on by an applicant, must be considered and weighed individually and/or cumulatively, and with other evidence relied upon to establish unfairness or bias on the part of the tribunal.

[47] I must also deal with the submission by learned counsel for the respondents in SKBHCVA2019/0033, that those respondents, being not parties to the proceedings giving rise to the judgment or the orders sought to be relied on as fresh evidence of apparent bias or unfairness, would be prejudiced if this Court were to grant the Fresh Evidence Applications. The essence of this submission, as I understand learned counsel, is that the respondents would not have access to the transcripts and other documents in those proceedings, not being parties thereto entitled to receive such documents. While I have some sympathy with

this submission and line of reasoning, the fundamental issue here is whether these documents sought to be relied on as fresh evidence by the applicants, are credible (which they clearly are), and would probably have an important influence on the question of whether Ventose J ought to have recused himself on the basis of an appearance of a lack of impartiality, when viewed from the position of the notional fair-minded and fully informed observer. If the documents are found to meet this second criterion, whether they are taken individually or collectively or cumulatively with other cogent evidence relied on in the Recusal Applications, then permission ought to be given to rely on them in the hearing of the interlocutory appeals.

[48] The gravamen of the applicants submissions on this issue is that the judgment and orders are relevant to the issue of whether, to the informed fair-minded observer, it could be concluded that there was a real possibility that the learned judge lacked the necessary complete impartiality, or may be biased against the applicants in dealing with or continuing to deal with these five matters, involving as they do, Mr. Adam Bilzerian and Mr. Dan Bilzerian, and various defendant companies in which their father, Mr. Paul Bilzerian, is a director.

[49] In this regard, the applicants point to what they say is the learned judge's predetermination of the application the subject of the judgment and order of 14th October 2019, which they contend was dismissed without an assessment of the merits, and for reasons which were clearly and obviously not correct as a matter of fact, and as a matter of the clear provisions of CPR 22.3. The short point is that the matters relied on by the learned judge at paragraph 4 of his judgment were obviously wrong in that the application had in fact been signed by a party, Mr. Adam Bilzerian, and not by Mr. Paul Bilzerian, as the judge stated. Further, there is no rule of law which requires an affidavit in support of an application to be sworn to by a party to the proceedings. They contend that this approach by the learned judge betrayed a lack of impartiality towards the applicants because of their representation, at certain stages of the proceedings, by Mr. Paul

Bilzerian, and belies a certain mindset of the judge in relation to Mr. Paul Bilzerian and, hence, those parties. At paragraph 16.2 of the applicants' written submissions, they conclude that these matters "[were] so palpable that it can only be viewed by the fair-minded person as evidence that the learned judge pre-determined the matter".

[50] Specifically, in relation to the orders of 31st October 2019 and 30th January 2020, the applicants contend that the fair-minded observer would reasonably conclude "that the learned judge has adopted the position that Mr. Paul Bilzerian should not be involved in any capacity in matters before him". The applicants argue that, by the 31st October 2019 order, the learned judge wrongly, and in disregard of the provision of CPR 22.3, struck out the defence of the second defendant company on the erroneous and incorrect basis that it must be represented by a lawyer and could not be represented by Mr. Paul Bilzerian, who is a director of the second defendant company. This they say was directly in conflict with CPR 22.3. Moreover, they rely on the learned judge having made, on 17th October 2019, an unless order prohibiting Mr. Paul Bilzerian from representing the said company, International Investments & Consulting Ltd, which order has not been reduced to writing.

[51] As to the 30th January 2020 order, the applicants argue that the learned judge, in direct conflict with CPR 22.3, made an order that if the first claimant, Adam Bilzerian, and the second and third claimants, Lemon Grove Company Limited and Caribbean Building Systems (St, Kitts) Limited, are not represented by a lawyer at the next adjourned date, the statement of claim will be struck out without further order. This order was made by the learned judge when Mr. Paul Bilzerian is in fact a director of the second and third claimant companies, entitled to represent them in legal proceedings pursuant to CPR 22.3.

[52] The applicants conclude by submitting: "[i]n the circumstances the orders afford additional grounds in support of the [a]ppellants' application for an order that

Honourable Mr. Justice Eddy Ventose be recused from hearing any further applications”.

Conclusion

- [53] The applicants have pointed to several alleged errors committed by the learned judge in relation to the matters the subject of the judgment and orders sought to be relied on as fresh evidence. It is not for this Court on applications to admit these documents as fresh evidence, to determine whether the judgment and orders lead to a conclusion that the learned judge was not impartial or treated the applicants unfairly, and therefore ought to have granted the Recusal Applications and recuse himself from any further participation as a judge in these matters. Those are matters to be determined upon a full hearing of the interlocutory appeals.
- [54] However, in my judgment the applicants have satisfied the second criterion in **Ladd v Marshall** for permission to rely on all three documents at the hearing of the interlocutory appeals in these five matters. In my view, these documents can be used to buttress any argument by the applicants that the learned judge probably lacks the impartiality, as the presiding judicial officer, to hear and determine further applications and proceedings in these five matters. It is my considered opinion that these documents would probably have an important, albeit not necessarily decisive, influence on the result of the interlocutory appeals. They speak to the exclusion of a director, Mr. Paul Bilzerian, from representation of certain companies which are either claimants or defendants in these proceedings, and to the making of certain orders which, if not complied with, would lead to the statement of claim of those companies being struck out without further order. They also speak to the prohibition of Mr. Paul Bilzerian from representing his sons, Adam and Dan Bilzerian, in these proceedings, when he has been doing so at various times during the various proceedings before Ventose J and indeed this Court.

[55] In determining the Fresh Evidence Applications, this Court is mindful of the overriding objective to do justice between the parties. In my considered view, the justice of the matter requires that the applicants be permitted, and not excluded, from relying on these three documents as fresh evidence during the hearing of their respective interlocutory appeals. These documents relate to the applicants' case on appeal that the learned judge may have treated them unfairly or not impartially as it relates to certain applications and matters before him, as already canvassed above. In saying this, this Court expresses no opinion one way or the other about the merits or likely outcome of the interlocutory appeals, mindful that judges and judicial officers are not immune from making errors of both fact and law, and that what may seem to be blatant or obvious errors, are not necessarily demonstrative or decisive of a lack of impartiality or unfairness or apparent bias on that part of the judge.

Disposition

[56] Accordingly, it is ordered that the respective applications filed on 9th March 2020 by the applicants in these five matters, for permission to admit and to rely, as fresh evidence, on the following three documents, namely: (1) the written judgment of Ventose J dated 14th October 2019 in Claim No. SKBHCV2012/0154 – Gerald Lou Weiner and Kathleen Weiner v Adam Bilzerian; (2) the order made by Ventose J on 31st October 2019 in Claim No. SKBHCV2016/0082 – Stephen First and Corporate Capital (Asia) Ltd v Gregory Gilpin-Payne and International Investments & Consulting Ltd; and (3) the order made by Ventose J on 30th January 2020 in Claim No. SKBHCV2017/0072 – Adam Bilzerian, Lemon Grove Company Limited, Caribbean Building Systems (St. Kitts) Limited v Terrence V. Byron, Byron & Byron and Kevin Horstwood, upon the hearing of each of the five interlocutory appeals filed on 5th March 2020 against the order of Ventose J dated 25th July 2019, are granted.

[57] On the matter of costs, the Court invites short written submissions by learned counsel for each of the parties in these five applications, to be filed and served within 7 days of the date of this judgment.

I concur.

Louise Esther Blenman

Justice of Appeal

I concur.

Mario Michel

Justice of Appeal

By the Court

Chief Registrar