BARBADOS

IN THE SUPREME COURT OF JUDICATUTE

HIGH COURT

CIVIL JURISDICTION

No. 687 of 2007

BETWEEN:

CHARLES IAN WALTER BRATHWAITE ***Applicant***

AND

CHIEF PERSONNEL OFFICER ***First Respondent***

PUBLIC SERVICE COMMISSION ***Second Respondent***

ATTORNEY-GENERAL ***Third Respondent***

Before the Honourable Madam Justice Margaret Reifer, Judge of the High Court.

2008: February 07

Mr. Maurice King, Q.C., Mr. Edmund King and Mr. Adrian King for the Applicant

Mr. Hal Gollop, Mr. Steve Gollop and Mr. Hilford Murrell for the Respondents

DECISION

[1] In the hearing of this Application for Judicial Review the proceedings had almost reached completion when counsel for the Applicant surprised us with a new application. At that stage of the proceedings all affidavits had been admitted, witnesses tendered and cross-examined, as considered necessary. Both sides had closed their case.

[2] Counsel for the Respondent addressed us on Wednesday November 19 2007. Counsel for the Applicant commenced his address on Friday December 14 2007 and the matter was adjourned to December 18 2007. It was on that date that counsel for the Applicant made application for the case to be re-opened and new evidence received that would (in his words) assist the court in arriving at the truth of this matter.

[3] When invited by the court to outline the legal authority for so doing, counsel cited two cases as authority therefor, namely **Thexton v Edmonton (1868)** and **Ladd v Marshall (1954) C A.**

[4] In **Thexton v Edmonton** there was a motion for the reception of new evidence, consequent on the subsequent discovery of a material witness after the evidence was closed. The application was refused, Romilly MR being of the opinion that to grant the application would alter the practice of the court. He however considered that the court had the power to accede to such an application in the following circumstances. He stated:

> "The only grounds on which new evidence is allowed
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> to be received …are: First, when a person who desires to
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> file an affidavit has not had an opportunity of seeing the evidence on the other side; secondly, where, though he has seen the evidence he finds that it raises a new issue not raised by the pleadings, and which is material to the decision of the case; thirdly, where an affidavit has been filed impeaching the character of a witness in which case the person whose character is assailed is allowed to adduce evidence to meet the charges; and, fourthly, where, after the evidence has closed, new facts have arisen which are material to the issue."

[5] Counsel for the Applicant sought to argue the relevance of the fourth ground to the facts of this case.

[6] The second case, **Ladd v Marshall (1954) CA 745** was stated by both counsel for the Applicant and Respondent to be the seminal case on point. This was an application before the Court of Appeal to adduce further evidence, to be proffered by a witness to the effect that her evidence at trial was not the truth. The court, in recognizing its authority to so do held, that for the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be such as is presumably to be believed, and, as the evidence sought to be adduced was not of that description, it would not be admitted.

[7] Denning, LJ in his judgment stated that the principle to be applied on an application for a new trial is the same as those always applied when fresh evidence is sought to be introduced. He stated:

> "In order to justify the reception of new 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."

[8] Counsel for the Respondents sought and was granted leave to respond on the issues of law before counsel for the Applicant addressed on the evidence occasioning the application, to avoid (in his submission) any prejudice. His argument in principle was:- [1] That **Ladd v Marshall** is applicable only to evidence sought to be adduced on appeal and [2] In any event, the three considerations outlined in **Ladd v Marshall** had not been met.

[9] I have not and will not at this stage address this second submission made by counsel for the Respondents as it can only be considered against the background of what evidence the applicant purports to adduce and this has not yet been done.

[10] I therefore at this stage only address the submission made by counsel for the Respondents that there is no authority at High Court or trial judge level for the acceptance of new evidence after commencement of closing arguments or for that matter after close of the case.

[11] There is no doubt in my mind that as a High Court judge such a discretion is vested in me. It does not stand to reason that such a power would be vested only in a Court of Appeal, especially when one understands the reason for its being. **Cross & Tapper on Evidence** (10th ed.) at p.19 bests outlines this as follows:-

> "The rule in **Ladd v Marshall** is designed to ensure that litigation is not unduly prolonged, but as such, it is subservient to the principle that a litigant should not succeed from fraud, and in such a case fresh evidence may be admitted notwithstanding the restrictions imposed by the rule, thus avoiding the need to institute fresh litigation to set aside the judgment."

[12] This clearly says to me (and reasonably so) that a high court judge is better suited to hear new evidence than a Court of Appeal, as the probable result of a successful application to the Court of Appeal is a return to the High Court for re- trial.

[13] **Phipson on Evidence** (16th ed.) readily accepts the applicability of **Ladd v Marshall** to High Court proceedings and further posits that the powers of a high court judge in these circumstances are in fact wider than the Court of Appeal's. At page 360 of Chapter 13 on this subject of the admission of new evidence it states as follows:-

> "A trial judge has a discretion to receive new evidence after judgement has been given but before an order has been drawn up. In **Charlesworth v Relay Roads Ltd (2000) 1WLR 230** it was held that the trial judge had the necessary jurisdiction to allow a party to amend his pleadings and to call new evidence in such circumstances. Whilst the court held that the **Ladd v Marshall** principles should be in the forefront of the court's mind it also expressed the view that a trial judge is entitled to be more flexible than the Court of Appeal when considering such an application to admit new evidence. There may be exceptional cases where the application should be granted even though all three **Ladd v Marshall** requirements are not fulfilled."

[14] It is suggested otherwise at 12-03 of the same text that where appropriate the trial judge may adjourn the proceedings to allow the other parties time to consider this evidence and may punish the party who adduced new evidence late by appropriate costs orders "in particular that the costs occasioned by the adjournment be paid by the party who adduced new evidence late".

[15] It is therefore my finding that as a High Court judge I do have the jurisdiction to hear such an application .

[16] It now remains for counsel for the Applicant to persuade me that I should exercise my discretion in this matter, it being recognized in the several authorities mentioned (in particular **Charlesworth v Relay Roads Ltd)** that such discretion should be sparingly exercised and in exceptional cases only. In this regard I must hear his submissions on the evidence that he now seeks to adduce in order that I may apply the three tests outlined in **Ladd v Marshall** and those other considerations alluded to in **Phipson on Evidence** and outlined by Neuberger J. in his judgment in **Charlesworth v Relay Roads Ltd**, that a trial judge and not a Court of Appeal judge may take into account.

(Counsel for the Applicant then addressed on the 'new evidence')

[17] In dealing with the second aspect of this application, I must now look at the evidence sought to be adduced by the Applicant in his bid to re- open the trial of this action.

[18] There are two limbs to the Applicant's application as follows:-

1. To adduce the evidence of Mr. Chesterfield Atherley

   to the effect that he was interviewed for the post of Deputy Permanent Secretary after September 7 2005.

2. To recall the First Respondent and require her to attend before the court and produce the following documents:

   (a) The documents containing the submissions prepared and presented by the Personnel Administration Division to the Second Respondent in relation to the interviews for promotion to Deputy Permanent Secretary held in 2005;

   (b) The minutes relating to the interview of Mr. Chesterfield Atherley for the post of Deputy Permanent Secretary; and

   (c) The minutes relating to the recommendations for appointment to the posts of Deputy Permanent Secretary made by the Second Respondent;

   (d) The PSC5 forms recommending Ms. Harriet Sealy for acting appointment as Deputy Permanent Secretary from 12th February 2007 to 2nd March 2007 and from 10th April 2007 to 18th May 2007;

   (e) Minutes of the meeting held by the Second Respondent to discuss the recommendation of Ms. Harriet Sealy for acting appointment as Deputy Permanent Secretary.

[19] This is based on the submissions made in paragraphs 10 to 17 of the unfiled but sworn Affidavit of the Plaintiff.

The application to adduce the evidence of Chesterfield Atherley.

[20] At paragraph 2 of his unfiled Affidavit the Applicant deposes:-

> "After the First Respondent concluded her evidence, I was concerned that interviews for promotion to Deputy Permanent Secretary and the decision on recommendations for promotion were completed on the 7 September 2005."

[21] Counsel for the Applicant argued that this issue only arose after evidence was given by the First Respondent. I do not agree. This was not new evidence and should not have taken the Applicant by surprise. This was always the position maintained by the First Respondent. At paragraph 21 of her Affidavit sworn and filed on June 13th 2007 the First Respondent, consistent with her oral testimony deposed:

> " … The process for interviewing candidates commenced on the 14th February 2005 and was completed on the 7th September 2005…"

[22] In denying the application to adduce the evidence of Mr. Atherley I am influenced by the following considerations:-

1. This is not new evidence. This is an application for the late admission of evidence. The Applicant's position always has been (both prior to and during these proceedings) that he was superseded both in 2005 and 2007. The First Respondent stated her position thereto as long ago as June 13 2007. By the Applicant's own admission information concerning this evidence was readily available from none other than his own sister, herself an interviewee for the position. The Applicant filed these proceedings under a Certificate of Urgency and insisted that he was ready to proceed. To now make this application runs counter to the first of three **Ladd v Marshall** principles "that the evidence could not have been obtained with reasonable diligence for use at the trial."

2. If this evidence were admitted it would not in my opinion have a decisive influence on the case (the second **Ladd v Marshall** principle). The Plaintiff alleges that this evidence will significantly affect this case as it will show that the Applicant had been "superseded". I do not agree. I have consistently noted that I will deal separately with the 2005 and 2007 events. The concession/admission of the First Respondent is that an anomaly was created by the 2005 regrading and that the persons interviewed were identified for eligibility prior to February 2005 before the regrading was effected. Thus, in my opinion, this evidence does not have a decisive influence on the case because it does not prove conclusively or

incontrovertibly that the Applicant was "superseded". The evidence does not support "supersession" in 2005, but rather the failure of the Public Service Commission to foresee the impact of the implementation of the regrading.

Secondly, when I analyse the relevance of this evidence to the relief sought it impacts only on item (c) of the relief outlined in the Notice of Originating Motion filed in April 2007 and is itself not germane to the

determination of that issue.

[23] I now deal with the application to recall the /first Respondent to produce the documents listed in the Applicant's Affidavit in Support of the Application for Admission of New Evidence.

[24] Counsel for the Applicant made a telling admission in this regard. He stated that he was "prepared to accept that with reasonable diligence this evidence could have been obtained in 2007" and did not arise from Ms. Atkins' evidence.

[25] What is also relevant in this regard is that counsel for the Applicant filed several Notices To Produce Documents directed to the Chief Personnel Officer, the Head of the Civil Service and the Permanent Secretary of the Ministry of the Civil Service. These Notices, with the exception of the documents concerning the interview of Mr. Chesterfield Atherley, overlap the information being requested at 17(a), (c), (d) and (e) of the Applicant's Affidavit in support of this application.

[26] The following chronology of events is also in my opinion germane to this issue. The hearing of this matter commenced in October 2007, and at that time the Respondents were all represented by counsel from the Solicitor General's Chambers. On November 12 2007 Mr. Gollop filed a Notice of Change of Attorney and entered an appearance for the Respondents. Mr. Gollop immediately sought to clarify the issue of the

Notices to Produce. He argued that the Judicial Review Rules make no provision for discovery of documents. He referred to Order 24 Rule 7 of the Rules of the Supreme Court as being relevant in the circumstances This Order, in his submission, required the filing of an application Supported by an Affidavit. Since this was not done by the Applicant, he was objecting to the Notices To Produce as they did not comply with the provisions of Order 24 Rule 7.

[27] Counsel for the Applicant having been taken by surprise by this submission, was allowed by the court to reserve his position until the following day. At the start of proceedings on the following day, counsel for the Applicant promptly withdrew the said Notices and declined to cross-examine the Head of the Civil Service and the Permanent Secretary of the Ministry of the Civil Service.

[28] In my opinion, having abandoned a course of action that would have addressed the production of relevant documents, counsel has now sought at the end of the case to re-open the trial to obtain, by and large, the same documents /information earlier requested and then abandoned.

[29] This speaks loudly to the circumstances in which this court can or should be persuaded to exercise its discretion. In this regard I adopt the remarks of Waller L.J. in **Worldwide Corporation Ltd v G.P.T Ltd** (an unreported December 1998 decision of the Civil Division of the Court of Appeal and referred to by Neuberger J. in **Charlesworth v Relay Roads Ltd)** as follows**:-**

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by

the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business would be conducted efficiently…

Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?...

… The court is concerned with doing justice but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one … to show the strength of the new case and why justice both to him, his opponent and litigants, requires him to be able to pursue it."

[30] Since in my opinion no serious injustice will be done, and mindful of the exhortation to discourage applications to put in late evidence (as distinguished from new evidence), I decline to exercise my discretion and hereby deny the application made to re-open this case.

Margaret Reifer

Judge of the High Court.