

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Civil Appeal No. 6 of 2010**

**BETWEEN:**

**MARJORIE ILMA KNOX**

**APPELLANT/JUDGMENT  
DEBTOR**

**V**

**JOHN VERE EVELYN DEANE  
ERIC ASHBY BENTHAM DEANE**

**FIRST RESPONDENT  
SECOND RESPONDENT/FIRST  
JUDGMENT CREDITOR**

**OWEN BASIL KEITH DEANE  
ELIZABETH TESS ROHMANN  
LYNETTE RACHEL DEANE  
MURIEL EILEEN DEANE  
OWEN GORDON FINLAY DEANE  
ERIC IAIN STUART DEANE  
KINGSLAND ESTATES LIMITED**

**THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT  
SIXTH RESPONDENT  
SEVENTH RESPONDENT  
EIGHTH RESPONDENT  
NINTH RESPONDENT/  
GARNISHEE**

**CLASSIC INVESTMENTS LIMITED**

**TENTH RESPONDENT/SECOND  
JUDGMENT CREDITOR**

**PHILIP VERNON NICHOLLS**

**ELEVENTH RESPONDENT**

**BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Sandra P. Mason  
and The Hon. Andrew D. Burgess, Justices of Appeal.**

**2014: May 26**

**2015: June 19**

**Mr. Alair P. Shepherd, QC in association with Mr. Phillip McWatt for the  
Appellant.**

**Mr. Leslie F. Haynes, QC on behalf of Kingsland Estates Limited the Ninth  
Respondent/Garnishee.**

**Mr. G. Clyde Turney, QC in association with Ms. Doria M. Moore on behalf  
of Eric Ashby Bentham Deane and Classic Investments Limited, the Second  
and Tenth Respondents/Judgment Creditors.**

## DECISION

**BURGESS JA:**

### **INTRODUCTION**

- [1] This is an application by Mrs. Marjorie Knox, the appellant in Civil Appeal No. 6 of 2010. The notice of application filed on 15 March 2013 reads in part as follows:

“**Take Notice** that the Applicant pursuant to Part 62.16 (3) of the Supreme Court (Civil Procedure) Rules, 2008 and the directions of the Registrar made on the 25<sup>th</sup> day of January 2013 and the order of the Honourable Sandra Mason Justice of Appeal sitting as a single Justice of Appeal on the 27<sup>th</sup> February 2013 applies to the Court for the following orders:

1. that the appellant be granted leave to amend the Notice of Appeal in the terms of the draft amended Notice of Appeal exhibited to the affidavit filed herewith
2. that the appellant be granted leave to adduce additional evidence at the hearing of the appeal such evidence being as is set out in the affidavit of John Knox filed herewith...”

- [2] Based on the orders sought in the notice of application, this Court is required to confront for the first time **Rule 62.4 (7)** of the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)**, which regulates this Court’s jurisdiction to amend notices of appeal, and **Rule 62.23**, which governs the admission of fresh evidence by this Court which was raised but not pursued in **Cadogan v**

**Banfield, Civil Appeal No. 18 of 2009.** To begin with, however, we consider it useful to give some background context to the application.

### **BACKGROUND TO THE APPLICATION**

[3] The application now before us is a relatively recent instalment in the saga of the **Knox v Deane** litigation which runs way back to the 1980's. The application itself has its origins in an order garnishee absolute made by **Worrell J** on the 12 August 2010 (and which is the subject matter of Appeal No. 6 of 2010) in certain execution proceedings by way of garnishee in High Court Action No. 1805 of 1998. The order was that the garnishee, to satisfy the order for costs made by the Judicial Committee of the Privy Council, (i) pay to the second respondent the sum of \$228,266.76 to be deducted from the dividend payable to the applicant on shares owned by her in Kingsland Estates Ltd (KEL); (ii) pay to the tenth respondent the sum of \$173,452.70 to be deducted from the said dividend payable to the applicant; (iii) is entitled to set off the sum of \$284,061.75 with interest thereon at the rate of 8 per centum from 3 April 2006 to be deducted from the said dividend payable to the applicant.

[4] Having obtained leave of this Court on 10 September 2010 to do so, the appellant filed a notice of appeal against the order made by **Worrell J**. The notes of evidence were received on 22 January 2013 and the matter was set

for case management by the Registrar of the Supreme Court for 25 January 2013. On that same day, the Registrar was informed of the appellant's intention to make the application now before us. The Registrar then adjourned the application directing that the application be filed and heard by a single judge on 27 February 2013 pursuant to **Rule 62.14 (6) of CPR**.

[5] On 4 February 2013, the appellant filed the application for hearing as directed by the Registrar. The application was supported by the affidavit of John Knox, the son of the appellant/applicant, filed with the notice of application (the Knox affidavit). On 27 February, **Mason JA**, sitting as a single judge, heard the application and referred it to this Court. It is this application which is now before us for our determination.

[6] The "Rulings to be challenged" and the "**AND TAKE NOTICE** that the grounds on which the Respondent intends to rely" in the draft amended notice of appeal attached to the Knox affidavit in support of the application provide very important background. Accordingly, we set these out as they appear in the draft amended notice of appeal only italicising the amendments sought in this application.

[7] First, "Rulings to be challenged:

- 1) The Order should be made absolute as the Applicant is the registered owner of the shares on the record of shareholders kept by the Company.

2) That although not specifically stated in the judgment any mortgage of the said shares and or trust instrument which the applicant made in relation to the said shares is irrelevant to the question as to whether the dividends should be attached by way of an order absolute.

3) In deciding whether to make a garnishee (sic) order absolute against a shareholder who is to receive dividends the court is only obliged to look at the register of the company's shareholder (sic) and is not entitled and/or obliged to take into account any mortgage or trust instrument in relation to those shares.

4) That the Ninth Respondent should be paid interest at the rate of 8%.

5) *That the Court was able to treat the garnishee(sic) application as extending to an application to set off.*

6) *Denying the application to adjourn for service upon the interested parties such as mortgagee Peter Allard, the Trustee Kathryn Davis, and the beneficiaries Jane Goddard and John Knox ("the Interested Parties").*

7) *Ordering the set off and the garnishee (sic) absolute of the dividends on dismissing the application for an order that the dividend be paid into court and service of the application be done on the Interested Parties without hearing the appellant on the merits of the Application and allowing the appellant to file an affidavit in response to the affidavit of Eric Ashby Bentham Deane filed on 11 August 2010."*

[8] Second, "**AND TAKE NOTICE** that the grounds on which the Respondent intends to rely":

"1. The learned Trial Judge erred in law in failing to grant to the applicant time to answer the affidavits of the respondents

alleging fraud which had been served as late as the day before the hearing.

2. The learned Trial Judge erred in law in relying on the fact that the applicant Judgment debtor was the registered owner of the shares in the records of the Company Kingsland Estates Limited.

3. The learned Trial Judge erred in law in failing to take into account the following matters

3.1 the said shares were the subject of mortgage deeds and trust instruments that that (sic) the said applicant was not the beneficial owner of the shares and therefore not entitled to the beneficial interest in the dividends.

3.2 the applicant had other creditors and had been alleged by the respondents to be insolvent.

4. The judgment which was to be enforced did not carry any provision for interest and/or the said rate is unreasonable.

5. The appellant will seek to amend this notice and/or add to these grounds when the reasons of the learned Trial Judge become available.

6. *The learned trial Judge after hearing the arguments on the question of service and the necessary parties ruled not only on the issue of the parties and payment into Court but on the Guarantishee (sic) application itself without giving the Appellant an opportunity to refute the evidence of Fraud in the affidavit of Eric Ashby Bentham Deane filed on 11 August 2010 and/or to be heard on that point.*

7. *The Court should either allow the introduction of new evidence or take judicial notice of that evidence being an affidavit sworn to by Eric Ashby Bentham Deane and filed in Civil Appeal Number 21 of 2006 and High Court Action*

*Number 1683 of 1993 which affidavit contained a sworn statement in the following terms” (sic).*

*7.1 “The share register of Kingsland shows that Mrs. Knox is the holder of 28,570 common shares of no par value in Kingsland **but such shareholding is in doubt** for as a result of information gleaned in Civil appeal No. 17 of 2001 **Mrs. Knox has executed a declaration of trust dated November 28, 2002 of all her shares in Kingsland in favour of her children Eugene Estwick John Knox and Maria Jane Goddard** (copy of declaration is attached hereto and marked Exhibit ‘B’).”*

*8. The respondents having previously sworn to the following effect that the Appellant was not and/or her ownership of the shares was in doubt and gained an advantage by that sworn position is abusing the process of the Court by making this application to seek orders on the basis that the appellant is in fact the owner of the shares.*

*9. Having raised the issue of Fraud in the affidavit of Eric Ashby Bentham Deane filed on the 11 August 2010 and ruling on the substantive application the Learned Trial Judge deprived the Appellant of an opportunity of placing evidence before the Court on the issue of Fraud that issue being a matter before the Court since 2003 and continues despite application made by the Appellant to dismiss to (sic) for lack of Prosecution.”*

## **ISSUES RAISED IN THE APPLICATION**

- [9] It is clear from the foregoing that two broad issues are at stake in this case. The first is whether the appellant should be granted leave to amend the notice of appeal in the terms of the draft amended notice of appeal. This may be conveniently called the jurisdiction to amend issue. The second is

whether the appellant should be granted leave to adduce additional evidence as set out in the Knox affidavit at the hearing of the appeal. This may be referred to as the fresh evidence issue.

- [10] Despite their treatment in the notice of application as two separate issues, they are in fact intimately intertwined as determination of whether the amendments sought should be permitted depends in large measure upon whether leave to adduce fresh evidence should be granted. Consequently, in this judgment, we deal first with the jurisdiction to amend issue. After that, we deal with the fresh evidence issue. Finally we conclude with a consideration of what amendments, if any, should be allowed.

## **COURT’S ANALYSIS AND CONCLUSIONS**

### **The Jurisdiction to Amend Issue**

- [11] This Court’s jurisdiction to amend the grounds of appeal in a notice of appeal resides in **Rule 62.4 (7) of CPR**. That rule provides as follows:

“The appellant may amend the grounds of appeal once without permission at any time within 28 days from receiving notice that a transcript of the evidence and judgment is available, or at any time by permission of the court.”

- [12] In the English House of Lords case of **Colquhoun v Brooks (1889) App Cas 493 at 506 (HL)**, Lord Herschell said:

“...it is beyond dispute,...., that we are entitled and indeed bound when construing the terms of any provision found in a

statute to consider any other parts of the Act which throw light on the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be construed if considered alone and apart from the rest of the Act.”

That principle of statutory interpretation is now canonised in the English House of Lords decision of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 (see also the Caribbean Court of Justice in **Campbell v A-G of Barbados** (2009) 76 WIR 63 at 66 para [43] and this Court’s decision in **E. Pihl & Sons A/S (Denmark) v. Brøndum A/S (Denmark) Civil Appeal No. 24** of 2012. In its recent decision of **James Ifill v. The Attorney General et al, Civil Appeal No. 3** of 2013, this Court accepted that principle of interpretation as applicable in interpreting our **CPR** and construed **Rule 62.6 (3)** in light of **Rule 62.6 (1)** and **(2)** in that case.

[13] In our judgment, the **Ifill** approach to **CPR** is crucially important in understanding the meaning of **Rule 62.4 (7)**. That rule provides, on its plain words, for two different amendment procedures. These may be conveniently labelled a “without permission” procedure and a “by permission of the court” procedure. Read by itself, however, the rule does not give any clear indication as to when these different procedures are applicable. We agree with Mr. Haynes QC’s rather elegant argument that to make such a

determination, **Rule 62.4 (7)** must be read together with **Rule 62.9**, and in particular **(1) (a)** and **(b)**, which makes provision for the “action by the court on receipt of notice of appeal”.

[14] **Rule 62.9 (1) (a)** and **(b)** provides as follows:

- (1) Upon the notice of appeal being filed, the Registrar must forthwith,
  - (a) where the appeal is a procedural appeal appoint a date, time and place for the hearing and give notice to all parties; and
  - (b) where the appeal is from the High Court,
    - (i) arrange for the court below to prepare a transcript of the notes of evidence and of the judgment; and
    - (ii) when the notes and judgment referred to in sub-rule (i) are prepared, give notice to all parties that copies of the transcript are available on payment of the prescribed fee...

[15] It bears red-pencilling here that **Rule 62.9 (1) (a)** requires nothing more than that the Registrar, on the filing of a procedural appeal, “appoint a date, time and place for the hearing and give notice to all parties”. A procedural appeal, therefore, does not involve the Registrar giving any notice as to the availability of a transcript of the evidence and judgment from the Registrar. On the other hand, it is equally plain from **Rule 62.9 (1) (b)** that a stipulated step in appeals from the High Court, other than procedural appeals, is the

parties to the appeal “receiving notice that a transcript of the evidence and judgment is available” as required by **Rule 62.4 (7)**.

[16] Two inevitable deductions emerge from the foregoing analysis as to when the different amendment procedures in **Rule 62.4 (7)** are to be followed by an appellant. The first is that the “without permission” procedure is available in all appeals from the High Court, other than procedural appeals. This must be so since the “without permission” procedure applies only where an appellant receives notice that a transcript of the evidence and judgment is available, and this only happens in appeals from the High Court, other than procedural appeals. The second is a corollary of the first. It is that, because an appellant in a procedural appeal does not receive notice that a transcript of the evidence and judgment is available, the “without permission” procedure cannot be available in procedural appeals. Accordingly, we are in agreement with Mr. Haynes QC that amendment in procedural appeals can only be by the “by permission of the court” procedure.

[17] Given the foregoing and for completeness, it may be advantageous to consider at this stage the meaning of the phrase “at any time by permission of the court” in **Rule 62.4 (7)**. Mr. Shepherd QC contends that, when **Rule 62.4 (7)** is read in light of **Rule 62.4 (8)** and **(9)**, this phrase is to be

interpreted as conferring on this Court a discretion which should normally be exercised in favour of granting permission to amend.

[18] **Rule 62.4 (8)** provides:

“The appellant may not rely on any ground not mentioned in his notice of appeal without the permission of the court.”

And, **Rule 62.4 (9)** in turn provides:

“The court is not confined to the grounds set out in the notice of appeal, although it may not make its decision on any ground not set out in the notice of appeal unless the respondent has had sufficient opportunity to contest the ground.”

[19] As is immediately evident, **Rule 62.4 (8)** forbids reliance by an appellant on any ground not mentioned in his notice of appeal without the Court’s permission. But, **Rule 62.4 (9)** significantly waters down this bald forbiddance by permitting that the Court is not confined to the grounds set out in the notice of appeal as long as the respondent has had sufficient opportunity to contest the ground. Put another way, the clear intimation of **Rule 62.4 (9)** is that the only limitation on the Court’s discretion to permit an amendment to a notice of appeal is that the respondent is allowed sufficient opportunity to contest the amended ground. That intimation argues for a liberal approach to the exercise of the discretion to permit an amendment.

[20] In our judgment, **Rule 62.4 (8)** and **(9)** are integral to understanding the phrase “at any time by permission of the court” in **Rule 62.4 (7)**. Those sub-rules point to the conclusion put forward by Mr. Shepherd QC, namely, that the discretion in **Rule 62.4 (7)** should normally be exercised in favour of granting permission to amend. We would only add that, on the whole, that interpretation is entirely warranted as it gives effect to the overriding objectives of **CPR** as stated in **Rule 1.1**, and in particular to the objectives of ensuring that the parties are on an equal footing and of ensuring that the case is dealt with expeditiously and fairly.

[21] Given the foregoing interpretation of **Rule 62.4 (7)**, the critical question now becomes: how is that rule to be applied in this case?

[22] As to this question, first, we agree with Mr. Turney QC for the respondents that the appeal in this case is a procedural appeal as defined in **Rule 62.1 (3)** of **CPR**. It is not an appeal from a decision of a judge which directly decides the substantive issues in a “claim” which is the definition of procedural appeal in **Rule 62.1 (3)**. It is an appeal in respect of an execution order made by **Worrell J.** and as such is not concerned with a “claim” as “claim” is defined in **Rule 2.3** and more fully described in **Part 8** of **CPR**. It is therefore a procedural appeal. We would add *en passant* that, for that reason, we do not agree with Mr. Shepherd QC that the essential nature of an

appeal, procedural or other, is to be determined by how it was treated by the Registrar and/or a single judge. There is nothing in **CPR** to suggest such a test. The sole test is that found in **Rule 62.1 (3)** of **CPR**.

[23] Second, it being a procedural appeal, the amendment sought by the appellant must be by permission of this Court. That said, this Court will exercise the discretion conferred on it in **Rule 62.4 (7)** to grant amendments to notices of appeal on the principle that that discretion should normally be exercised in favour of granting permission to amend. However, as many of the amendments sought in this case are intimately bound up with the right of the fresh evidence issue, we postpone our decision as to which, if any, of the proposed amendments will be permitted until after our consideration of this issue.

### **Fresh Evidence Issue**

[24] We now turn to the second major issue raised in this case, the fresh evidence issue. In our judgment, resolution of this issue depends on the proper interpretation of the relevant **CPR** rule governing fresh evidence, namely, **Rule 62.23**. That rule provides as follows:

“(1) This rule applies to any application to the court to receive evidence in proceedings on an appeal additional to evidence in the court below, as in an appeal in which a new trial is sought on the ground of fresh evidence.

- (2) This rule applies unless the court otherwise directs.
- (3) The application shall be made by motion on the hearing of the appeal without filing or serving notice of the motion.
- (4) The grounds of the application shall be stated in an affidavit.
- (5) Any evidence necessary to establish the grounds of the application, and the evidence which the applicant wishes the court to receive shall be given by affidavit.
- (6) The applicant shall file any affidavit not later than 28 days before the hearing of the appeal.
- (7) The evidence of any other party to the appeal shall, unless the court or a judge otherwise orders, be given by affidavit filed not later than 14 days before the hearing of the appeal.
- (8) A party to the appeal shall, not later than the time limited him to file an affidavit under this rule
  - (a) lodge as many copies of the affidavit as the Registrar may direct; and
  - (b) serve three copies of the affidavit on each other party to the appeal.”

[25] The learned authors of *The Caribbean Civil Court Practice* (Lexis Nexis, 2008) at p 354, Note 31.10 opine on this rule: “The rule addresses itself only to the manner in which such an application must be made and not with the principles that must govern the court in determining whether to admit the

evidence.” Unfortunately, the learned authors do not provide any interpretational pathway to their opinion on **Rule 62.23**.

[26] In our respectful view, that opinion does not correctly state the law in **Rule 62.23**. Contrary to that opinion, it emerges quite clearly from a proper reading of **Rule 62.23** that that rule embraces two distinct sets of rules. The first set which are contained in **Rule 62.23 (1) and (2)** make provision as to the legal principles applicable to the receipt by this Court of new evidence. On the other hand, the second set found in **Rule 62.23 (3) to (8)** outline the procedure to be followed in making an application to this Court for the receipt by this Court of fresh evidence. The issue in this case is as to applicable principles and not applicable procedure and so we address only the question of applicable principles and thus **Rule 62.23 (1) and (2)** hereafter.

[27] To begin with, it is our view that a proper reading of **Rule 62.23 (1)** reveals that that sub-rule codifies the rule of practice which was firmly laid down in the English Court of Appeal case of **Ladd v Marshall [1954] 1 WLR 1489 (Ladd v Marshall)** and which was fully accepted in this Court prior to **CPR**. As is well known, that case concerned an appeal in which the appellant sought a retrial on the basis that a witness who had previously “lied” was now willing to “tell the truth”. The case was therefore one in

which a new trial was sought on the ground of fresh evidence. On the plain words of **Rule 62.23 (1)**, in “any application to the court to receive evidence in proceedings on appeal additional to evidence in the court below” the fresh evidence rule applies “*as in* an appeal in which a new trial is sought on the ground of fresh evidence”. (Emphasis added). “As in” here means “in the same way as in” “an appeal in which a new trial is sought on the ground of fresh evidence”, or in other words, as in **Ladd v Marshall**. Any other interpretation of **Rule 62.23 (1)** is forced to argue that the words “as in an appeal in which a new trial is sought on the ground of fresh evidence”, so integral a part of that sub-rule, are otiose, mere surplusage!

[28] In **Ladd v Marshall**, Denning LJ encapsulated the basic rule of practice in a three-pronged test as follows at **page 1491**:

“First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; 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; 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.”

[29] By **Rule 62.23 (1)**, then, this three-pronged test laid down in **Ladd v Marshall** is the basic test to be applied where an issue arises as to the receipt by this Court of new evidence. This test reflects strict adherence to the

general principle of finality of judgments of this Court, subject only to appeals to the Caribbean Court of Justice.

[30] **Rule 62.23 (2)**, however, confers a discretion on this Court to relax the strictness of the conditions stipulated in **Ladd v Marshall** in appropriate cases. This discretion is indubitably in furtherance of the overriding objective of doing justice mandated in **Part 1** of **CPR**. It is also no doubt recognition of the body of pre-**CPR** authority to the effect that in some cases the relaxation of **Ladd v Marshall** might be appropriate: see, e.g., **Langdale v Danby [1982] 1 WLR 1123**; **Electra Private Equity Partners v. KPMG Peat Marwick [2001] 1 BCLC 589 (Electra Private Equity)**.

[31] And so, we pause here to summarise the legal principles applicable to the receipt by this Court of new evidence under **CPR**. By **Rule 62.23 (1)** of **CPR** the three-pronged test laid down in **Ladd v Marshall** constitutes the primary legal principles applicable in determining the receipt by this Court of new evidence. However, this Court has a broad discretion in **Rule 62.23 (2)** to direct otherwise. This discretion is to be exercised only when necessary to achieve the overriding principles of justice underlying **CPR**. Pre-**CPR** authority, and for that matter, even post-**CPR** authority, therefore, has only persuasive value in deciding whether the overriding principles of justice require that a departure from **Ladd v Marshall** should be directed.

The facts and circumstances of each case alone determine whether the overriding principles require the exercise of the **Rule 62.23 (2)** discretion.

[32] Given the foregoing, the question which now arises for our determination is whether the present case is one in which the primary legal principles in **Ladd v Marshall** are applicable or whether this is a case where this Court should direct otherwise. On this question, the only reason given as to why this Court should direct that the primary legal principles in **Ladd v Marshall** should not apply and that it should direct otherwise is that this is a case where “there has not been a hearing on the merits”.

[33] The English case law provide persuasive insight into the jurisprudence of the applicability of **Ladd v Marshall** in interlocutory hearings. In the English Court of Appeal decision of **Electra Private Equity** at **620**, it was said that in interlocutory appeals some relaxation of the strictness of **Ladd v Marshall** might be appropriate, according to the nature of the interlocutory hearing and the individual circumstances of the case. Again, in the English Court of Appeal decision in **Thune v. London Properties Limited [1990] 1 WLR 562**, Bingham LJ (with whom the other two members of the court agreed) acknowledged that **Ladd v. Marshall** need not be applied "in its full rigour" in interlocutory appeals. However, he went on to say at **page 571**: "There is nonetheless a clear duty on parties to present their full case at

first instance, and it is very undesirable if interlocutory disputes are argued out afresh on appeal on different materials never put before the judge whose primary discretion it is”.

[34] It is patently obvious from this case law that the mere fact that an appeal is an interlocutory appeal is not enough to warrant a departure from **Ladd v Marshall**; it depends on the nature of the interlocutory appeal and the individual circumstances of the case. In our view, this is even more so post-**CPR**, since this Court may only direct a departure from **Ladd v Marshall** where it is necessary in achieving the overriding principles of justice underlying **CPR**. Merely to assert that “there has not been a hearing on the merits”, then, is clearly not enough to direct a departure from **Ladd v Marshall**.

[35] We turn then to applying the principles in **Ladd v Marshall** to the present case.

[36] First, was it shown that the evidence in the Knox affidavit could not have been obtained with reasonable diligence for use at the trial? In our view, it has not been so shown. The relevant affidavits on which the Knox affidavit seeks to rely were sworn by the deponents thereto in 2003, 2006 and 2007. The order nisi was served on Mrs. Knox’s attorney-at-law on 2 July 2010. By affidavit filed on 22 July 2010, Mr. John Knox, as Mrs. Knox’s agent,

opposed the grant of garnishee order absolute. They could therefore have been obtained with reasonable diligence for use at the time of the hearing of the garnishee application in August 2010.

[37] Second, was the evidence such that, if given, would probably have an important influence on the result of the case, though it might not have been decisive? Again, in our view, the answer to this question is in the negative for the following reasons.

[38] It will be remembered that the case concerned an application in High Court Action No. 1805 of 1998 for an order garnishee absolute against dividends payable to the appellant/applicant on shares owned by her in KEL to satisfy the order for costs made by the Judicial Committee of the Privy Council. The “fresh evidence” stated in the Knox affidavit seeks to show that Mrs. Knox’s shareholding in KEL “*is in doubt for as a result of information gleaned in Civil Appeal No. 17 of 2001 Mrs. Knox has executed a declaration of trust dated November 28, 2002 of all her shares in Kingsland in favour of her children Eugene Estwick John Knox and Maria Jane Goddard*”.

[39] At that time of the hearing, the appellant/applicant, Mrs. Knox, was the registered owner of her shares in KEL. Because of **section 179** of the **Companies Act, Cap. 308 (Cap. 308)**, the only evidence that could put her

shareholding “in doubt”, and probably have an important influence on the result of the case, was that the appellant/applicant or a third party had presented to KEL a share transfer from Mrs. Knox in her individual capacity to herself as trustee under any trust duly stamped and adjudicated, or that the original share certificate for Mrs. Knox’s shares in KEL had been produced to KEL. Furthermore, the evidence would also have to show that a share transfer from Mrs. Knox in her individual capacity to herself as trustee had been presented to the Registrar of Corporate Affairs within thirty days of the execution of such transfer in compliance with **section 179 (4A) of Cap. 308**. But even such evidence might not have had an important influence on the result of the case since **section 171 of Cap. 308** prohibits the recognition of trusts by a company or the Registrar of Corporate Affairs.

[40] Third, is the evidence credible? The evidence is indeed credible, but as was just seen, largely irrelevant to the result of the case.

[41] It is our judgment, then, that the appellant/applicant has not satisfied the requirements of the three-pronged test laid down in **Ladd v Marshall** which by **Rule 62.23 (1) of CPR** constitutes the primary legal principles applicable to the receipt by this Court of new evidence. For this reason, the application to admit fresh evidence in this case is denied.

[42] Before leaving the fresh evidence issue, we would make two quick observations in respect of two submissions by Mr. Shepherd QC aimed at circumventing **Rule 62.23 (1)** of **CPR**. The first is Mr. Shepherd QC's submission at para 19 of his "Outline Submissions" that:

"...the Court can take judicial notice of the previous affidavits sought to be introduced. While all facts in issue or relevant to the issue in a case must be proved by evidence brought before the Court by the parties before it, the Court may take judicial notice of facts of which no evidence has been given."

We are bound to observe that Mr. Shepherd QC has not shown us how this Court can reconcile this alleged rule of practice with the violence its invocation threatens to do to **Rule 62.23 (1)** of **CPR**. In the absence of any authority or relevant principle, we cannot accept that submission.

[43] The second is Mr. Shepherd QC's submission at para 30 of his "Outline Submissions" that:

"...the appellant should be allowed to introduce this evidence to allow an argument that the respondents are guilty of an abuse of process. The question of whether a litigant is guilty of an abuse of process is a matter for the inherent jurisdiction of the Court. It can therefore be raised ay (sic) any time as it is the duty of the Court to ensure that its process is not used for an improper purpose."

Of this submission, we would only say that it appears to us to be based on an insufficient analysis of the nature of this Court's inherent jurisdiction which was extensively explored by **Mason JA** in **Victorine Garvey v Peter**

**Wilkinson, Civil Application No. 7 of 2011** and **Goodridge JA in Oscar Maloney v Commissioner of Police, Magisterial Application No. 6 of 2014**. It had been earlier considered by Lord Woolf CJ in the English Court of Appeal decision of **Taylor v Lawrence [2003] QB 528**. These authorities establish that it is first necessary for the court to have jurisdiction, whether given by statute or by rules of court, to deal with a particular matter, before it can draw on its inherent jurisdiction. It is for this reason that we cannot accept Mr. Shepherd QC's submission in this case.

#### **CONCLUSIONS ON THE PROPOSED AMENDMENTS**

[44] We now turn to a consideration of which, if any, of the proposed amendments to the notice of appeal should be permitted. We begin with the proposed amendments to the "Rulings to be challenged" in the notice of appeal and then deal with the amendments sought under the rubric "**AND TAKE NOTICE** that the grounds on which the Respondent (sic) intends to rely".

[45] As noted above in this judgment, the appellant seeks permission to amend the "Rulings to be challenged" to add three paragraphs as follows:

*"5) That the Court was able to treat the guaranishee (sic) application as extending to an application to set off.*

*6) Denying the application to adjourn for service upon the interested parties such as mortgagee Peter Allard, the Trustee*

*Kathryn Davis, and the beneficiaries Jane Goddard and John Knox (“the Interested Parties”).*

*7) Ordering the set off and the guaranishee (sic) absolute of the dividends on dismissing the application for an order that the dividend be paid into court and service of the application be done on the Interested Parties without hearing the appellant on the merits of the Application and allowing the appellant to file an affidavit in response to the affidavit of Eric Ashby Bentham Deane filed on 11 August 2010.”*

[46] It will be recalled that at para [23] of this judgment, we concluded that the discretion to permit amendments to a notice of appeal in **Rule 62.4 (7)** should normally be exercised in favour of granting permission to amend. Applying that view of the law to the present application, we can see no reason why permission should not be granted to amend the “Rulings to be challenged” to include those paragraphs.

[47] Turning next to “**AND TAKE NOTICE** that the grounds on which the Respondent (sic) intends to rely”. Here, as seen above, the appellant seeks permission to amend the notice of appeal under this rubric to add five paragraphs as follows:

*“6. The learned trial Judge after hearing the arguments on the question of service and the necessary parties ruled not only on the issue of the parties and payment into Court but on the Guaranishee (sic) application itself without giving the Appellant an opportunity to refute the evidence of Fraud in the affidavit of Eric Ashby Bentham Deane filed on 11 August 2010 and/or to be heard on that point*

7. *The Court should either allow the introduction of new evidence or take judicial notice of that evidence being an affidavit sworn to by Eric Ashby Bentham Deane and filed in Civil Appeal Number 21 of 2006 and High Court Action Number 1683 of 1993 which affidavit contained a sworn statement in the following terms” (sic)*

7.1 *“The share register of Kingsland shows that Mrs. Knox is the holder of 28,570 common shares of no par value in Kingsland **but such shareholding is in doubt** for as a result of information gleaned in Civil appeal No. 17 of 2001 Mrs. Knox has executed a declaration of trust dated November 28, 2002 of all her shares in Kingsland in favour of her children Eugene Estwick John Knox and Maria Jane Goddard (copy of declaration is attached hereto and marked Exhibit ‘B’”.*

8. *The respondents having previously sworn to the following effect that the Appellant was not and/or her ownership of the shares was in doubt and gained an advantage by that sworn position is abusing the process of the Court by making this application to seek orders on the basis that the appellant is in fact the owner of the shares.*

9. *Having raised the issue of Fraud in the affidavit of Eric Ashby Bentham Deane filed on the 11 August 2010 and ruling on the substantive application the Learned Trial Judge deprived the Appellant of an opportunity of placing evidence before the Court on the issue of Fraud that issue being a matter before the Court since 2003 and continues despite application made by the Appellant to dismiss to (sic) for lack of Prosecution.”*

[48] Consistent with our interpretation of **Rule 62.4 (7)**, we would permit amendment of the notice of appeal under the rubric “**AND TAKE NOTICE** that the grounds on which the Respondent (sic) intends to rely” to add

paragraphs 6, 7.1, 8 and 9. However, in light of our conclusions in respect of the fresh evidence rule in **Rule 62.23 (1) and (2)** of **CPR**, we would disallow the amendment sought in paragraph 7 under that rubric.

### **DISPOSAL**

[49] In light of the foregoing, it is ordered as follows:

(i) that the appellant be granted leave to amend the “Rulings to be challenged” in the notice of appeal to add paragraphs 5, 6 and 7;

(ii) that the appellant be granted leave to amend the “**AND TAKE NOTICE** that the grounds on which the Respondent (sic) intends to rely” in the notice of appeal to add paragraphs 6, 7.1, 8 and 9;

(iii) that the appellant be denied leave to amend the “**AND TAKE NOTICE** that the grounds on which the Respondent (sic) intends to rely” in the notice of appeal to add paragraph 7.

There will be no order as to costs.

Justice of Appeal

Justice of Appeal

Justice of Appeal