

LADD V MARSHALL: RELEVANT OR REDUNDANT?

Joshua Wu Kai-Ming

ABSTRACT

Ladd v Marshall [1954] 3 All ER 745, an English Court of Appeal decision, is a landmark decision on the introduction, admission of fresh and further evidence in a case where judgment has been delivered. *Ladd v Marshall* has been adopted by the Malaysian superior courts, including the Federal Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70. However, subsequently, the Rules Committee introduced Rule 7(3A) of the Rules of the Court of Appeal 1994, Order 55, Rule 5A of the Rules of the High Court 1980, and Order 55, Rule 7 of the ROC 2012 with regard to the introduction/admission of fresh/further evidence at the hearing of an appeal. Notwithstanding that, some courts appear to still apply the principles in *Ladd v Marshall* rather than the requirements found in the relevant legal provisions. This paper seeks to argue that *Ladd v Marshall* is now redundant (at least in relation to introduction/admission of fresh/further evidence in the Court of Appeal and below) in light of the abovementioned legal provisions.

Keywords: fresh evidence, further evidence, court rules

INTRODUCTION

Ladd v Marshall [1954] 3 All ER 745 (“*Ladd v Marshall*”), an English Court of Appeal decision, is a landmark decision on the introduction/admission of fresh/further evidence in a case where judgment has been delivered.

Such is the impact of *Ladd v Marshall* that the Federal Court of Malaysia in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 (“*Lau Foo Soon*”) adopted the test enunciated by Denning L.J. therein.¹

Essentially, according to *Ladd v Marshall*, in order for the Court to introduce/admit fresh/further evidence, the Applicant must show:

- i. the evidence could not have been obtained with reasonable diligence for use at the trial (“Reasonable Diligence”);
- ii. 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 (“Important Influence”); and
- iii. the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible (“Credibility”).

The principles in *Ladd v Marshall* continued to be authoritative and applicable in Malaysian jurisprudence, some would argue even up to this day.

Notwithstanding the above, it is submitted that *Ladd v Marshall* is redundant (at least in relation to introduction/admission of fresh/further evidence in the Court of Appeal and below)² in light of the relevant legal provisions

¹ *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70, at p. 71; see also *Chai Yen v. Bank of America National Trust & Savings Association* [1980] 2 MLJ 142

² A case could be made that *Ladd v Marshall* [1954] 3 All ER 745 is still relevant with regard to the introduction/admission of fresh/further

which have been introduced *vis-a-vis* the introduction, admission of fresh and further evidence at the hearing of an appeal.

In 1998, through PU(A) 380/1998, Rule 7(3A) of the Rules of the Court of Appeal 1994 (“RCA 1994”) was introduced and laid out the test for the introduction/admission of fresh/further evidence in appeals in the Court of Appeal:

“(3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that—

- a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it [“Availability”], or that reasonable diligence would not have made it so available; and
- b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court [“Determining Influence”], as the case may be.” (emphasis mine)

For the High Court, PU(A) 342/2000 introduced Order 55, Rule 5A of the Rules of the High Court 1980 (“RHC 1980”) which mirrors the requirements in Rule 7(3) of the RCA 1994.

Although the RHC 1980 has been repealed and replaced by the Rules of Court 2012 (“ROC 2012”), Order 55, Rule 5A of the RHC 1980 can still be found in Order 55, Rule 7 of the ROC 2012.

For the introduction/admission of fresh/further evidence in appeals from decisions of Registrars of the High Court, a similar test is laid down as seen in Order 56, Rule 1(3A) of the ROC 2012.

evidence in the Federal Court as the Rules of the Federal Court 1995 does not contain any legal provision on the same (see e.g. *Dato’ Seri Anwar bin Ibrahim v Public Prosecutor* [2016] 3 MLJ 277, at paragraph 21)

Codification of *Ladd v Marshall*?

At first glance, the above legal provisions appear to have codified the test in *Ladd v Marshall*.

This was the position of the Court of Appeal in *Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176³ where Low Hop Bing JCA (as His Lordship then was) held:

*“The governing principles enunciated in Ladd v Marshall [1954] 3 All ER 745 have been accorded statutory recognition in r 7(1) and (3A)(a) of the Rules of the Court of Appeal 1994.”*⁴

However, upon further inspection, it is evident that the test in the RCA 1994 differs from the test in *Ladd v Marshall* in the following aspects:

- i. the RCA 1994 test introduced the Availability requirement as an alternative requirement to the Reasonable Diligence requirement (as seen from the use of the word “or”);
- ii. the RCA 1994 test raised the bar by introducing the Determining Influence requirement rather than sticking to *Ladd v Marshall*’s Important Influence requirement; and
- iii. the RCA 1994 test does not have the Credibility requirement.

(collectively referred to as the “Three Differences”)

As such, it would only be accurate to say that the above legal provisions selectively codified a part of *Ladd v Marshall* namely the Reasonable Diligence requirement.

³ See also *Hong Leong Bank Berhad v Hsui Fong Machinery (M) Sdn Bhd and Others* [2009] MLJU 1387; and *Samsuri bin Baharuddin & Anor v Borneo Samudera Sdn Bhd* [2017] MLJU 1917, at paragraph 14

⁴ *Hue Ngee On v Chai Woo Sien (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176, at paragraph 7

Do the Legal Provisions Complement Ladd V Marshall?

In his dissenting decision in *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, Abdul Malik Ishak JCA had the occasion to say "... that rule 7 of the Rules of the Court of Appeal 1994 and Order 55 rule 5A of the RHC complement the three conditions of *Ladd v. Marshall*."⁵

His Lordship, however, did not take the time to explain how they could be complementary when the Determining Influence requirement has a higher threshold than the Important Influence requirement.

Additionally, taking His Lordship's remarks on face value, this would mean that the Credibility requirement applies today notwithstanding the Rules Committee's explicit refusal to incorporate the same into the relevant legal provisions.

Ironically, in the same dissenting judgement, His Lordship also said:

*"We now have rule 7(3A) of the Rules of the Court of Appeal 1994 and we should vigorously apply it to the present appeal at hand instead of resorting wholesale to Ladd v. Marshall."*⁶

In view of the Three Differences, it would be more prudent to take the position that only the requirements found in the relevant legal provisions should be considered in applications for the introduction/admission of fresh/further evidence.

⁵ *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, at paragraph 83

⁶ *Teoh Kien Peng & Anor v Thannimalai a/l Subramaniam* [2009] 1 LNS 308, at paragraph 52

What is the Legal Position Today?

Abang Iskandar JCA (now CJSS) in *Ting Sieh Chung @ Ting Sie Chung v Hock Peng Realty Sdn Bhd* [2016] 5 MLJ 342 [“Ting Sieh Chung”] remarked that *Ladd v Marshall* still represents the legal position on the matter to this day:

“The principle to be applied in admission of fresh evidence during the pendency of an appeal is clearly stated in the English case of Ladd v Marshall [1954] 3 All ER 745. Our very own apex court in the case of Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 had embraced the same principle which still represents the legal position on the matter till to this day.”⁷ (emphasis is mine)

With all due respect to Abang Iskandar JCA (now CJSS), *Lau Foo Soon* and *Ladd v Marshall* should only be recognised as being the correct legal position pre-selective codification.

Even up until recently, some Court of Appeal judges are applying *Ladd v Marshall* and *Lau Foo Soon* in absentia Rule 7(3A) of the RCA 1994.⁸

With the introduction of Rule 7(3A) of the RCA 1994, Order 55, Rule 5A of the RHC 1980, and Order 55, Rule 7 of the ROC 2012, especially in light of the Three Differences, the Courts should be prioritising and applying the test found therein.

⁷ *Ting Sieh Chung @ Ting Sie Chung v Hock Peng Realty Sdn Bhd* [2016] 5 MLJ 342, at paragraph 24

⁸ E.g. see *Tan Ah Thong v Che Pee @ Che Hanapi bin Saad and Anor* [2009] MLJU 984; *Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors* [2018] 1 MLJ 346, at paragraph 14; *Yahya bin Timbon & Ors v Kumpulan Parabena Sdn Bhd* [2020] 5 MLJ 774, at paragraph 6