

JERSEY / JUDGMENT

Campbell -v- Campbell and Ors

[2016] JRC 190 (18 October 2016)

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judgment

the deputy bailiff: 1. This is an application to admit new evidence after the end of a trial but before the judgment has been circulated in draft or handed down. 2. The substantive case before the Court relates to one aspect of a dispute between two brothers, Richard Andrew Campbell ("Richard") and Robert Campbell ("Robert") concerning their respective entitlements to an interest in various corporate entities through which they conducted their jewellery business or held assets. Longton Holdings Limited ("Longton") is a limited liability company incorporated in Jersey, the beneficial entitlement to the shares of which are held equally by Richard and Robert. The parties cited hold 50% of those shares as nominees for Robert and Richard holds the remaining shares in his own name. The essence of the claim is whether or not Richard is entitled to share in the capital and interest of a loan made to Longton in the amount of £2,919,018.75 and the capital of an interest free loan or loans in the amount of £264,988 (for these purposes referred to as the Longton loans). Other aspects of the dispute between Richard and Robert are being dealt with in proceedings in the High Court of Justice in England ("the English proceedings"). 3. On 7 th June, 2016, after some six days of evidence and submissions, this Court reserved judgment in these proceedings. 4. Some weeks later we received notice of two applications. The first application was made by Richard to admit new evidence. The second application was made by Robert to strike out part of the prayer of Richard's re-amended Order of Justice the effect of which would be to reduce the ambit of the issues to be determined by the Court in its judgment to be handed down. On 13 th September, 2016, I sat to hear the first application to admit new evidence. This judgment deals with that matter. The second application has been withdrawn. 5. Richard applies to admit further evidence. That evidence can be divided into three categories: (i) Emails exchanged between Robert and Messrs Goodman Jones, Chartered Accountants ("the Goodman Jones emails"); (ii) Evidence which shows that contrary to Robert's express evidence given before this Court, in fact a will was drawn up for him during the course of October 2002; (iii) Evidence to show that a payment was made in the sum of £132,494 by Robert to Taylor Wessing's client account in June 2016. The relevance of this evidence will be touched on below. The Law 6. No Jersey authority was put before me to assist in identifying the factors bearing upon the Court's discretion to admit new evidence post-hearing but pre-judgment. One Jersey case, that of *Perry v Abraham*

- [2003] JRC 108 was cited but there were no reasons articulated by the Court for, in that case, declining to admit new evidence prior to handing down judgment. 7. It appears from the English authorities put before me that the approach of the Court, though varying somewhat to reflect the fact that an application to admit evidence is pre-judgment, is to look first at the principles on which the Court of Appeal will admit fresh evidence not before the trial court. Those principles are set out in the well-known case of *Ladd v Marshall*
- [1954] 1 WLR 1489 in which Denning LJ said this: "The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh 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. In *Charlesworth v Relay Roads*
- [2000] 1 WLR Neuberger J explained the approach that a court might take when faced with an application to admit new evidence before judgment by reference to the factors set out in *Ladd v Marshall* above. At page 295(f), he said this: "While I think that these three factors should be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down, but before the order has been drawn up, I incline to the view that the court is entitled to be somewhat more flexible, and not to proceed on the strict basis that each of these three conditions always has to be fully satisfied before fresh evidence can be admitted before judgment. Of course, in many ways, an applicant seeking to persuade the judge to receive fresh evidence and/or argument on a new point is in a very similar position to an appellant seeking similar relief from the Court of Appeal. He has had a full opportunity to collect his evidence and to marshal his arguments, and there must be a strong presumption against letting him have a second chance, particularly after he has seen in detail from the judgment why he has lost." 9. At page 296(e) the judge went on to say: "In these circumstances, I conclude that the following principles apply where a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up: (1) The court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) The court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) The general rules relating to amendment apply so that: (a) While it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that a court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) As with other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience

caused to other litigants; (4) Quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise a new point or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd -v- Marshall* ; (5) Almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) The court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare." 10. Of course *Ladd v Marshall* dealt specifically with the circumstances in which evidence should be admitted by the Court of Appeal that was not before the trial court and *Charlesworth v Relay Roads Limited* and others dealt with circumstances in which judgment had been handed down but the order had not been perfected. In those cases the applicant seeking to admit new evidence had had the benefit of reviewing the judgment and the reasons on which the court based the decision contained within the

judgment.

11. The instant case is rather different. There has been no judgment handed down and neither party in this case knows in whose favour the court will find or for what reasons. 12. I was referred to the judgment of Hamblen J in *Forster v Action Aviation Limited*

[2013] EWHC 2930 (QB) in which the learned judge was faced with an application to admit two further documents following the conclusion of trial but before judgment had been handed down. At page 299 of his judgment at paragraph 8 and 9 the judge said this: "8. The defendants submit that the lateness of this application makes the relevant considerations more akin to those which would apply post judgment such as are set out in *Ladd -v- Marshall* namely, whether the evidence could have been obtained with reasonable diligence of trial, whether it will have an important influence on the result and whether it is apparently credible. This is not a post-judgment application, I am not *functus officio* and this is not an appeal and in those circumstances I do not consider that *Ladd -v- Marshall* applies or at least not in its full rigor. Nevertheless it must be recognised that this is a very late application and to allow evidence in would be a relatively exceptional course which the Court is unlikely to take without good reason. 9. In considering how to exercise my discretion I would regard the following considerations of being particular relevance:

- (1) The reason why the evidence was not put forward before,
- (2) The significance of the evidence,
- (3) The prejudice to the applicant if the application is refused,

- (4) The prejudice to the other parties if the application is allowed,
- (5) The need to do justice to all the parties having regard to the overriding objective. I shall consider each of those factors in turn." 13. In my view the statement in *Forster v Action Aviation Limited* succinctly sets out the factors which I should consider when determining Richard's application to admit new evidence. I should certainly have regard to the principles in *Ladd v Marshall* but without expecting them to apply in full rigor and I should consider the factors set out in the quotation immediately above. The Goodman Jones emails 14. As I have said, the first category of new evidence that Richard wishes to adduce is the Goodman Jones emails. These emails came to light during the discovery process in the English proceedings. Those proceedings deal with a different aspect of the dispute between Richard and Robert to that dealt with and argued before this Court. However, in the course of discovery, and specifically after an application for specific discovery, Robert disclosed certain emails which had not formerly been available to Richard nor disclosed within the proceedings in Jersey. I will refer to two of the emails. 15. The first email passes between Robert and Goodman Jones and is dated 25 th January, 2012. In the email, Robert deals with setting up a trust and that that various assets should be transferred by Robert on that trust. It includes the words "my half of the assets are extricably linked to his (Richard's) half". 16. The second email passes from Robert to Goodman Jones dated 8 th February, 2012, in which Robert was responding to an enquiry made by Goodman Jones which expressed the assumption that 50% of the company (taken to be a reference to Longton) was to be transferred into trust and asking whether 50% of the benefit of the debt was also to be transferred. In his response Robert said "yes both assumptions are correct". 17. This, so Richard argues, is evidence that supports his case that he has a 50% interest in relevant assets and that those assets include the Longton loans. Further, so Richard argues, he could not have tendered the evidence earlier because he was not aware of it as it had not been disclosed as it should have been, it may well have an important effect, and it is apparently credible as it is Robert's own communication. 18. Robert resists the admission of this new evidence. Whilst conceding that the Goodman Jones emails are capable of bearing upon the issue as to whether there existed a common intention between Richard and Robert as to entitlement to the capital loan to Longton and interest it is argued that they are not significant and would probably not influence the result or affect any decision to be made. Robert points out that this area was the subject of cross examination on another document that was before the Court, nothing new would be gained, and the answers that Robert gave in response to that other document were likely to mirror the answers that he would give if cross-examined on the evidence which Richard now seeks to admit. 19. In my view, the Goodman Jones emails clearly should be admitted. The fact that they may touch on an area that has already been explored to an extent in cross-examination does not alter the fact that had they been available they could have been deployed before the Court to paint a clearer factual picture and put to Robert in cross-examination to challenge the likelihood or credibility of his answers on what might be said to be a key issue before the Court. The Will and the Taylor Wessing payment 20. The other two categories of evidence that Richard seeks

to admit do not directly touch upon issues to be determined by the Court. Indeed Richard concedes that those aspects touch to a greater extent on Robert's credibility. 21. It was argued on behalf of Robert that the last two categories of evidence are inadmissible because they go to collateral issues that relate to credibility and nothing more. I was referred to Cross on Evidence (12th edition) where at page 325 the learned authors deal with the general rule relating to finality of answers to collateral questions. The general rule is stated in the following terms: "There is a sound general rule... that the answers given by a witness to questions put to him in cross-examination concerning collateral facts must be treated as final. They may or may not be accepted by the jury, but the cross-examiner must take them for better or worse and cannot contradict them by other evidence." 22. Later, at page 326, after citing discussion about exceptions to the finality rule, the authors say: "The indubitable value of the finality rule should not blind us to the undesirability of a closed list of exceptions to it." 23. In dealing with the exceptions the authors say: "There are three well recognised exceptions - the fact that a witness has been convicted of a crime, the fact that he is biased in favour of the party calling him and the fact that he has previously made a statement inconsistent with his present testimony." 24. Phipson on Evidence (18th Edition) deals at paragraph 12-14 with the same issue. It says: "Answers to questions as to collateral facts, put in cross-examination, are generally regarded as final, in the sense that the cross-examining party may not then seek to contradict such answers by other evidence. There is no set means of determining what is collateral to the main issue in the case; the concept of collateral issue is just another way of expressing degrees of relevance. It is suggested that the rule may be applied flexibly under the CPR; with the judge considering the value that may be gained from allowing a party to adduce evidence in breach of the rule, as well as the amount of time that may be wasted thereby; rather than simply imposing an inflexible rule of law. In any event there are three recognised exceptions to the rule:

- 1) where a witness has been convicted of a crime; 2) previous inconsistent statements; and 3) evidence to show the witness is biased in favour of the party calling him." 25. The argument put forward by Robert essentially in my view amounts to a submission that if the second and third categories of documents had been before the Court and put to him in cross-examination, his answers would need to be taken as final and that no evidence could have been adduced to contradict his answers as they related to collateral issues and simply went to his credibility. 26. I do not find that argument, if I have characterised it correctly, persuasive. It seems to me that Robert's credibility, and indeed that of his brother Richard, is central to how the Court is likely to determine the issues before it. Furthermore the items that Richard now seeks to adduce are not unrelated to the subject matter of the proceedings. 27. The first such item, the second category of evidence which Richard has sought to adduce relates to the fact that, although Robert had stated in documentation before this Court, and in evidence, and indeed as part of his pleaded case that no will had been drawn up for him in 2002 it appears, from his disclosure in the English proceedings, that such a will had indeed been drawn up. In paragraph 38 of his amended answer Robert pleaded in terms "in the event the will was never made". It seems to me that Richard must be entitled to put

before the Court the fact that this pleading was simply wrong and do so armed with apparently conclusive evidence to that effect. For his part Robert might wish to offer an explanation as to why he said what he did in his pleading and evidence but that is an explanation that would form part of the overall picture and assessment of the evidence by the Jurats. It may be that the contents of the will are not relevant to the issues that need to be determined by this Court but it does not seem to me to be the case that the fact that a will has been drawn up, in the light of both the evidence already given and the pleadings, could be said to be wholly irrelevant. 28. Accordingly I admit the second category. 29. The third category is in respect of a payment made in July 2016 by Robert to Taylor Wessing's client account. 30. When he gave evidence before the Court in June 2016 Robert was asked why he was not in a position to agree that £264,988, a sum held by Robert and claimed in part by Richard, could not be paid into an escrow account or into the English High Court. Robert gave a number of answers including confirming that this sum of money was owed by him to a company involved in the case, Azure Gold Limited. He was pressed by counsel for Richard as to why he would not agree to transfer the money either in to escrow or to the English High Court and gave answers that, it is argued, were not clear or conclusive. It transpires that of this money £132,494 was paid on Robert's instructions in June 2016 to the client account of Robert's lawyers, Taylor Wessing. 31. The context of the evidence concerning the £264,988 was in part that Robert submitted through counsel that Richard's claims in the Jersey proceedings were pre-emptive and that Richard claimed that Robert might use that money for his own purposes. 32. It seems to me that this evidence might be relevant to the submissions before the Court and that, for completeness, it should be before us.

Conclusion

33. Having considered both the *Ladd v Marshall* principles and the factors set out in *Forster v Action Aviation Limited* it seems to me that it is appropriate to admit all three categories of evidence. The evidence was not before us because it was not available, it is significant or potentially so, there is no consideration of prejudice that weighs against it being admitted and it may support Richard's case. It is in the interests of justice to admit it. 34. How should this evidence now be placed before the Court? Both counsel submit that it should not be necessary for any further oral evidence to be heard. All of the evidence to be admitted is in the form of documentation and it seems to me that subject to what I say below it is best admitted by being exhibited to an affidavit from Richard identifying what the documentation is and a brief written submission from Richard's counsel as to the relevance of the documentation. That can be met by any affidavit that Robert may need to put before the Court to explain the contents of the documentation and a further written submission from Robert's legal adviser to make submissions on that evidence. 35. I do not think that submissions or affidavit evidence relating to why the documents were not before us sooner or otherwise about the discovery process would be relevant to what we have to determine and accordingly neither Richard's affidavit nor Roberts' should refer to those matters. 36. Richard's affidavit and submission should be filed within 7 days of the date hereof and

Robert's response 7 days thereafter. 37. I do not rule out the possibility that, that documentation being exchanged, there may need nonetheless to be examination and cross-examination. I hope that that will not prove necessary, but I give liberty to apply for that purpose and with regard to the timetable. Authorities *Perry v Abraham*

[2003] JRC 108 . *Ladd v Marshall*

[1954] 1 WLR 1489 . *Charlesworth v Relay Roads* [2000] 1 WLR. *Forster v Action Aviation Limited*

[2013] EWHC 2930 (QB). *Cross on Evidence* (12th edition). *Phipson on Evidence* (18th Edition).

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