IN THE COURT OF APPEAL OF BELIZE A.D. 2024
CIVIL APPEAL NO. 1 OF 2022

BETWEEN:

EWART ROBATEAU

APPELLANT/APPLICANT

and

ALLEN ROBATEAU

RESPONDENT/APPLICANT

Before:

The Hon. Mde. Louise Esther Blenman	Chief Justice
The Hon. Mde. Marguerite Woodstock Riley	Justice of Appeal
The Hon. Mde. Sandra Minott-Phillips	Justice of Appeal

Appearances:

Mr. Hubert E. Elrington, S.C. for the Appellant/Applicant
Ms. Emmerita Anderson for the Respondent/Defendant

2023: October 5.
2024: November 13.

Catchwords

Civil Appeal - Interlocutory Appeal - Application to Adduce Fresh Evidence – Cautions, Medical evidence - Test to Adduce Fresh Evidence - Test in Ladd v Marshall - Whether Evidence Could Not Have Been Obtained with Reasonable Diligence for Use in the Lower Court - Whether Adducing Fresh Evidence is in the Interest of Justice; Whether this court should strike out the appeal.

DECISION

INTRODUCTION

[1] **BLENMAN CJ:** There are two applications to be determined before this Court. The first is an application to adduce fresh evidence, made by Mr. Ewart Robateau, (*hereinafter* Ewart). The second is a Preliminary Objection filed by Mr. Allen Robateau (*hereinafter* Allen) that the appeal

be dismissed in its entirety. With no disrespect intended, as a matter of convenience, I have referred to the parties, who are brothers, by their first names respectively.

[2] I will now provide the brief factual background of the substantive appeal, in order to provide context for the applications that are before us.

BACKGROUND

[3] By way of Fixed Date Claim Form, Allen filed an action against Ewart for delivery of possession of property located at 1830 Chancellor Street, Belize City, Belize, more particularly described as Parcel 1839, Block 16, Caribbean Shores/Belize Registration Section (the "**Property**"). He sought to have Ewart deliver possession of the property and to pay damages for trespass, interest and costs. Ewart opposed Allen's claim and asserted that he was permitted to reside at the property by their mother, Ms. Anita Robateau, (*hereinafter* Anita) who was the previous title owner of the Property. Ewart further alleged that he was "induced" to build a dwelling house on the Property, based on a promise made by Anita, and therefore had an overriding life interest in the property. Ewart further contended that the transfer of the Property to Allen was voidable, since at the time of the transfer, their mother lacked the requisite mental capacity to effect the transfer and Allen unduly influenced Anita.

Issues in the Court below:

[4] The following three issues arose for consideration in the Court below:

(1) Whether Allen was entitled to possession of the Property.
(2) Whether Ewart was a bare licensee of the Property.
(3) Whether the transfer of the Property was voidable.

Judgment in the Court below:

[5] In a written judgement dated 14th February 2022, the learned judge held that Allen was the title owner of the property. The learned Judge ordered Ewart to deliver up possession of the property and to pay costs to Allen. The learned Judge indicated that she was satisfied that Ewart had failed to

discharge the evidential burden to substantiate an alleged equitable interest and was consequently found to be a mere licensee. Ewart did not file a counterclaim to establish the nature or extent of the alleged interest, nor did he provide the requisite documentary evidence to substantiate his allegations. Further, the Judge held that in all of the circumstances, Ewart had failed to establish that the transfer was voidable, or as a result of undue influence. The Judge therefore gave judgment for Allen.

[6] Being dissatisfied with the decision of the learned Judge, Ewart appealed to this Court.

GROUNDS OF APPEAL

[7] Indeed, Ewart is dissatisfied by the decision of the learned Judge and filed several grounds of appeal. They are not strictly relevant to the applications before this Court and there is no need to recite them here in detail. It suffices to state that he challenged, among other matters, the correctness of the entirety of the judgment. In particular, he took issue with the Judge's findings that Allen was the registered owner of the property. He also sought to disturb the judge's conclusion that Allen did not exert undue influence on Anita, thereby causing her to transfer the property to him. Ewart also challenged the judge's finding that he was in possession of Allen's property, in the capacity of a bare licensee and that he (Ewart) did not have any equitable interest in the property.

APPLICATIONS BEFORE THIS COURT

[8 The first application by Ewart is an application to adduce fresh evidence in the nature of the cautions of Michael and Yolo Robateau, a video recording, and testimony from Dr. John Sosa.

[9] The second application by Allen is a Preliminary objection to the Appeal which seeks to have it struck out.

CONDENSED ISSUES ON APPLICATIONS

[10] Upon careful examination of the written submissions and having heard the oral arguments of Learned Counsel for both parties, there are two condensed issues which arise for determination:

(a) Whether this Court should grant Ewart leave to adduce fresh evidence,

(b) Whether this Court should strike the Notice of Appeal filed by Ewart.

[11] This Court found it convenient to address the above two applications seriatim and this judgment will deal with both issues in a similar vein.

[12] I turn now to the submissions of Learned Counsel on both issues, dealing with each issue in turn.

SUBMISSIONS ON BEHALF OF EWART

FRESH EVIDENCE

[13] For his part**,** Learned Senior Counsel, Mr. Elrington's submissions were not specific. Mr. Elrington mainly argued that it is in the interest of justice and equity, and in keeping with the Overriding Objective of the **Civil Procedure Rules (CPR)** to be granted leave to adduce fresh evidence. He submitted that the 'fresh evidence' would show that Allen was aware at the time of the transfer, that their mother suffered from a mental illness, and thus lacked the requisite legal capacity to execute the transfer of the Property to Allen. Concerning the two (2) cautions lodged at the Lands Registry in 2018 and 2019, Ewart asserted this would establish that Anita was coerced and unduly influenced by Allen to transfer the property to him.

[14] In advocating for the leave to be granted to adduce the evidence Mr. Elrington stated in his written submissions as follows:

> *"2. Their fresh evidence will show that Allen Robateau readily knew, believed and understood that his mother had mental illness and exerted undue influence on her,*

an elderly woman for his own gain and that she was not in a legal capacity compos mentis to execute any transfer of any kind particularly such a transfer of Real Property. Moreover, that he withheld her travel documents and withheld her whereabouts from the rest of her immediate family, those who had a duty to know, so they would not challenge his unlawful act.

[15] To buttress his arguments Mr. Elrington posited that Allen failed to give full disclosure to the Court that he was aware that his mother suffered from mental illness. Learned Senior Counsel asserted that Allen deliberately did not alert the Court to the fact that he placed his mother in a foreign psychiatric facility at and around the time of the 'transfer'. As Mr. Elrington emphasized, this demonstrates that Allen wilfully and deceitfully hid information from the Court in pursuit of his unlawful fraud and deception. According to Mr. Elrington, the 'fresh evidence' establishes that Allen sent his advanced-in-age mother to the Ocean View Psychiatric Hospital, California U.S.A. where she was admitted to the psychiatric institution for "schizophrenia".

[16] Mr. Elrington submitted that it is in the interests of justice that the fresh evidence be admitted because the failure to do so would risk rewarding Allen, who has deliberately withheld materially adverse information from the Court. He argued that it would unfairly punish or prejudice Ewart in the protection of his due legal rights. He opined that parties have a duty of full disclosure to the Court and that this includes evidentiary disclosure which may be either supportive or adverse to a party's claim. As Learned Senior Counsel opined, a party cannot withhold evidence because it may be particularly adverse to his case. He stated that this evidence to be admitted is presumably believable and decisive.

[17] He insisted that the evidence of Michael Robateau and Yola Robateau is important to the trial. According to Mr. Elrington, they picked up and rescued Anita from the Psychiatric mental institution that Allen placed her in shortly after getting the "title" to the Chancellor Avenue property conveyed to himself. He submitted that Anita did not have compos mentis to execute any transfer of any kind.

[18] He maintained that this Court should grant Ewart leave to adduce fresh evidence of Ernesto Castillo, whereby he has a recording of Anita confirming that she had no recollection of

transferring any property to Allen. He submitted that this displays in strong terms that Anita did not wish to convey any title to the property to Allen.

[19] In addition, Mr. Elrington stated the evidence of the two Cautions lodged at the Lands Registry that were placed by Ewart and Anita jointly being dated 31st May 2018 and 22nd November 2019, respectively, in which Anita deposed under sworn oath that her estranged son, Allen coerced her into signing over the property to him, without her fully knowing what she was doing and her desire to recover it. This is of such important probative value that it would make a material difference in the outcome of the trial, Mr Elrington maintained.

[20] Also, Mr. Elrington argued that there is newly uncovered expert medical evidence of Dr. John Sosa, a preeminent and leading Neurologist in the jurisdiction of Belize, which establishes that Anita was in an advanced state of dementia (a medical disease and illness). According to Mr. Errington, the professional medical evidence will establish that Ms. Anita was not mentally fit to legally transfer any property.

[21] Mr. Elrington undergirded the applications for leave to adduce fresh evidence by referring the court to those matters and sought to persuade this Court to grant Ewart leave to adduce the fresh evidence, even though he did not specifically address the guiding principles that relate to applications to adduce fresh evidence.

STRIKING OUT

[22] Turning his attention next to Allen's preliminary objection the effect of which was an application by Allen to strike out Ewart's appeal, learned Senior Counsel, Mr. Elrington, stated this Court should not grant the application. Mr Elrington submitted that there are no reasonable grounds to deprive Ewart of a right to a hearing where there are proper issues to be ventilated. He relied on the decision of **Swain v Hillman**[1], which was cited in the Belizean Supreme Court decision of **Barbara Estella**

[1] [2001] 1 All E.R. 91

Romero v The Minister of Natural Resources[2] in support of this opposition to the strikeout application.

[23] I now turn to the submissions advanced on behalf of Allen in relation to both applications.

SUBMISSIONS ON BEHALF OF ALLEN

FRESH EVIDENCE

[24] Learned Counsel, Ms. Anderson, adverted the court's attention to a decision emanating from the Jamaican Court of Appeal by the learned McDonald-Bishop, JA (as the President of the Jamaican Court of Appeal then was) in **Louis Campbell v Ambiance Resort Properties Inc.**[3] Ms. Anderson, by way of comparison, submitted that the case provides instruction on the inapplicability of the overriding objective of the CPR to decide whether a court may grant permission for fresh evidence to be adduced on appeal. The relevant paragraphs of the judgment state, thus:

> *"[66] As already established, the CAR does not expressly provide for the reception of fresh evidence in civil appeals. There is also no statutory power conferred on the court to admit fresh evidence in civil proceedings similar to the provision of section 28 of the Judicature (Appellate) Jurisdiction Act, which confers power on the court to receive fresh evidence in criminal proceedings. As such, the CAR has not conferred that power on the court; and so, the overriding objective of the rules would not expressly apply to the exercise of the court's discretion in treating with a fresh evidence application. This has been made clear in the judgment of this court in* ***Darrion Brown*** *in which Phillips JA, speaking for the court, noted that:*
>
> > *"[37] The approach with regard to the exercise of the discretion of the court utilizing the overriding objective has arisen subsequent to the amendment of the [UK] Civil Procedure Rules (introduced by the Civil Procedure (Amendment) Rules 2000) ..."*
>
> *[67] Given that our rules have not been amended along the lines of the UK CPR to permit the Court of Appeal to receive fresh evidence on appeal, our court is still governed by the* ***Ladd v Marshall*** *test. It follows logically then that the approach regarding the use of the overriding objective in determining fresh evidence applications would not be applicable as it does not involve interpreting or applying any rule of the CAR. As we all know, the overriding*

[2] Claim No. 302 of 2012 (delivered on 8th May 2014)
[3] [2022] JMCA Civ 4 (unreported)

objective of the CPR (and, by extension, the CAR) is only operable when the court is interpreting or exercising powers under the rules (see rule 1.2 of the CPR)."

[25] Ms. Anderson in a similar vein asserted that there is no basis upon which this Court can utilise the overriding objective of the Supreme Court Civil Procedure Rules as the basis upon which to grant leave to adduce fresh evidence.

[26] In any event, Ms. Anderson strongly opposed Ewart's application seeking permission to adduce fresh evidence for the following reasons:

> *"The most well-known authoritative pronouncement of the law governing admitting fresh evidence on appeal is to be found in an old English case,* ***Ladd v Marshall [1954] 1 WLR 1489****. Under* ***Ladd v Marshall,*** *fresh evidence would be allowed on an appeal against a final decision only if the evidence:*
>
> 1. *could not have been obtained with reasonable diligence for use at the hearing in the lower court.*
> 2. *was such that, if given, would probably have had an important influence on the result of the case, though it need not be decisive; and*
> 3. *the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible."*

[27] Learned Counsel, Ms. Anderson, correctly stated that, based on **Ladd v Marshall**[4], the preconditions for the granting of permission are cumulative and so Ewart must satisfy each of them. She argued that Ewart had failed to satisfy the three prerequisites of **Ladd v Marshall,** and this failure was fatal.

[28] Alternatively, Ms. Anderson advocated that even if this Court is of the view that the overriding objective is applicable, Ewart failed under Rule 1.3 to assist the Court in furthering the overriding objective and failed to uphold his duty to disclose when he did not disclose the November 22, 2019, caution that was lodged by himself and his mother. This caution was not disclosed, nor was it brought before the court even though it was filed before the trial. Schedule II of Ewart's disclosure form does not show the two cautions listed, even though standard disclosure was done on the 1st day of August

[4] [1954] 1 WLR 1489; [1954] 3 All ER 745

2019, which is after the May 2018 caution was filed and before the second caution was lodged on the 22nd day of November 2019.

[29] Learned Counsel, Ms. Anderson pointed out that:

> *"In the transcript, the List of Documents on behalf of the Defendant dated the 31st day of July 2019, which was signed by the Appellant's attorney states, under Notice to Inspect, that the documents listed in Part I of Schedule I may be inspected at attorney for the Respondent's office.*
>
> *Diligence on the part of the Appellant at the Land Registry where the caution was registered could have also been found if the Appellant intended to rely upon the Caution of May 2018. Further, under cross examination the issue of caution dated the 31st day of May 2018 filed by Appellant himself was asked and had the* Appellant *exercised reasonable diligence could have been available at trial by virtue of a land title registry search, or an application by Senior Counsel.*
>
> *Further, even if the Appellant had forgotten about the filing of the May 2018 caution, under cross examination he was asked questions in reference to that caution and it was there that he mentioned another caution that was filed on November 22, 2019. This latter caution was never disclosed by the Appellant to the Respondent or the Court.*
>
> *Despite Appellant's testimony of filing two cautions under cross-examination at the conclusion of cross-examination Senior Counsel Elrington was asked if he will re-examine the witness and he opted not to."*

[30] Ms. Anderson was adamant in opposing the fresh evidence since in her view the two cautions filed could have been obtained through the exercise of reasonable diligence for use at the hearing in the lower court. Ms. Anderson also opposed admitting the evidence on the basis that the learned Senior Counsel could have made an application before the lower court judgment was perfected, to have the cautions before the court. The fact that this was not done, played an outsized role in Ms. Anderson's opposition to admitting the fresh evidence. Ms. Anderson argued further, that even if the cautions were produced, it would not have influenced the outcome of the case given the fact that the May 2018 caution did not state Ewart's overriding interest as the basis for lodging it.

[31] Ms. Anderson submitted that the November 22, 2019, joint caution ought not to be allowed because it was filed after the trial started and was not disclosed where Ewart had a duty to disclose under Rule 1.3. and Rule 28.4. Further objection was taken to the November 22, 2019 caution because it

does not state that Ewart has a life interest given to him by his mother. Learned Counsel argued that neither Ewart nor his mother, Anita spoke of any life interest as their basis for filing the caution. The mother stated that she was coerced by Allen to transfer the property because he did not allow her to speak to her other children. While Ewart in the caution stated that he built the house with a mortgage from Belize Bank and therefore has an interest. Therefore, even if the caution was before the trial court it would not have influenced the outcome of the case.

DISCHARGE SHEET & MEDICAL EVIDENCE

[32] Ms. Anderson stated that Ewart did not avail himself of the many ways in which he could have had medical evidence before the court *viz.,* Rule 29.9, 29.11, Rule 31 as well as Rule 32, when it was known that such evidence was necessary to prove his defence. She quite helpfully pointed this court to lines 14-20 found on page 152 (*sic*) of the transcript, Ewart was asked under cross-examination:

> *Q: Mr. Robateau, you referred to, I believe schizophrenia. Was there any medical evidence provided to this court or to the Land Registry of your mother's mental state based on your belief of coercion?*
>
> *A: Well, what happen–*
>
> *Q: Is there any medical evidence supporting that?*

At lines 11-17 found on page 153 (*sic*) of the transcript, the following question and answers under cross-examination of the Appellant took place:

> *Q: No, in these proceedings here today, did your attorney disclose any medical evidence to the Court in respect of a diagnosis of schizophrenia?*
>
> *A: Just the discharge paper–*
>
> *Q: Sir, let us be very clear. The Court does not have that document.*
>
> *A: Right, okay.*
>
> *Q: There are no documents the Court has as to this?*

[33] Ms. Anderson pointed out that at page 161 of the transcript of the proceedings in the trial court, it shows where Ewart was re-examined by Senior Counsel and that this is contrary to what Ewart said

at paragraph 10 of the grounds for the application to adduce fresh evidence (*sic*). Learned counsel noted that the medical report of Dr. John Sosa could not have been newly uncovered evidence as the report is dated 19th June 2023, a date after the trial had concluded. Ms. Anderson also challenged the content of the report on the basis that it speaks only to information that was told to the doctor and what he observed. Consequently, Ms. Anderson argued the report offends Rule 32.4(1) which states a further argument advanced was based on the fact that there was never any application made before the lower Court for an expert witness. Ms. Anderson stated that the evidence Ewart is seeking to adduce could have been put before the trial court at any time given the nature of the defence and Ewart's contention in the claim he brought and discontinued. Given the **Ladd v Marshall (supra)** principle, this evidence could have been obtained with reasonable diligence for use at the trial.

[34] Ms. Anderson highlighted that Ernest Castillo provided testimony at trial and never mentioned any recording when there was ample opportunity to so do. For this reason, learned counsel urged the court against admitting the recording. Learned counsel also objected to the evidence on the basis that sufficient context and foundation has not been laid as to when, where and by whom the recording was made – so as to be certain that the recording was made in a state or country where one party consent to recording is allowed. Ms. Anderson said that the other siblings could have also given a witness statement as it was Ewart's counsel who at the case management conference could have listed as many witnesses as he intended to call. However, only four witness statements were filed in their defence. The information Michael and his wife Yola Robateau now wish to tell the court was within their knowledge at the time of trial and as such could have been available at trial.

[35] Ms. Anderson stated that the present appeal does not concern fraud or new information which has now come to Ewart's attention. Learned Counsel asserted that all the evidence that Ewart now seeks to adduce were either in his possession and was capable of being obtained with reasonable diligence. Having regard to her contentions, Ms. Anderson urged that the application be dismissed with costs to Allen, in the interest of bringing finality to litigation.

APPLICATION TO STRIKE

[36] Learned Counsel, Ms. Anderson, urged this Court to strike out Ewart's appeal on the basis that Ewart had no reasonable ground for maintaining the appeal.

[37] Ms. Anderson, in sum, urged this Court to strike out Ewart's application on the basis that there was no evidence before the court of first instance to substantiate the grounds of appeal and that Ewart was setting to prosecute matters that have already been determined by the trial judge.

[38] Ms. Anderson further urged this court to dismiss Ewart's appeal since there are no substantive issues that should be determined on the full appeal, she said that the appeal is spurious or frivolous. Allen gave evidence that he was the owner of the property. Showed that he had a title certificate for the property. This fact was undisputed by both parties. Ewart did not bring the Lands Department as a party to the claim if the transfer was fraudulent. She opined that in order to prove fraud, Ewart would have had to add the Lands Department as a party to the claim. As much, the Judge did not misdirect herself. There was no evidence before the court to show that the transfer from the mother to Allen was voidable because of fraud, or because she lacked the capacity to understand in 2017 at the time of the transfer.

[39] Ms. Anderson stated that neither was there any evidence that there was undue influence exerted over the mother and that as such, the Judge found that Allen was the undisputed owner of the property and he pointed out and said that in the defence, Ewart raised the issue of promissory estoppel, and that there was a life interest in favour of Allen. Again, there was no evidence to support that the mother gave such a promise to Ewart.

[40] Ms. Anderson stated that Ewart testified that he relied on the promise to his detriment because he took out a loan at Belize bank. The property was subsequently mortgaged. She said that he did not provide any mortgage documents or registered documents from the Lands Department to show evidence of this mortgage. Neither Ewart nor any of his witnesses who testified on his behalf could show that a promise was made by the mother. Ms. Castillo, his brother, who testified on his behalf,

testified that Ewart told him about the promise. Ms Anderson was therefore adamant that we should strike out Ewart's appeal since he has no reasonable grounds to prosecute the appeal.

COURT'S ANALYSIS AND CONCLUSION

Fresh Evidence:

[41] We will first address the fresh evidence application followed by the application to strike out.

[42] We have considered the entirety of the arguments advanced by learned Senior Counsel, Mr. Elrington and the countervailing submissions of Learned Counsel, Ms. Anderson. We state at the outset that the Supreme Court Rules do not contain a specific rule governing the admission of fresh evidence on appeal in civil cases. There is no basis upon which this court can utilise the overriding objective of the Supreme Court Rules as a gateway to allow fresh evidence in this appeal. We accept the principles as stated by McDonald-Bishop, JA (as the President of the Jamaican Court of Appeal then was) in **Louis Campbell v Ambiance Resort Properties Inc. (supra)** to be relevant and helpful and can do no more than to accept them. Consequently, Ewart's reliance on Rule 1.1, 1.2 and Rule 1.3 of the Supreme Court Civil Procedure Rules 2005 is misplaced. We find the arguments advanced by Ms. Anderson on this matter persuasive and adopt them. However, this is not the end of the matter. We must focus on interrogating the relevant principles that guide Ewart's application to adduce fresh evidence in the appeal court. It is clear that they arise for our consideration.

[43] It is trite that the principles by which an appellate court is guided in admitting fresh evidence where there has been a trial on the merits was settled in **Ladd v Marshall (supra)**. This court has applied the **Ladd v Marshall** principles in several of its decisions and no useful purpose can be served by reciting those cases.[5]

[44] For present purposes, we remind ourselves of the enunciations of Denning LJ in **Ladd v Marshall** which bear repeating and are as follows:

[5] See RBTT Trust Ltd v Flowers Civil Appeal No. 29 of 2008 (delivered 23rd March 2012); Belize Electricity Ltd v Public Utilities Commission Civil Appeal No. 8 of 2009 delivered 8th October 2010)

> "*... to justify the reception of fresh evidence…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, though 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, though it need not be incontrovertible."*

[45] It is the law that the above test is to be applied strictly when fresh evidence is sought to be introduced on appeal following a trial on the merits. The case below falls squarely within the ambits of a full trial on its merits. Consequently, in the present appeal, the **Ladd v Marshall** pre-requisites must be strictly applied with full vigour.

[46] A corollary to the test in **Ladd v Marshall** is the well-known rule that parties to litigation have a clear duty to present their full case at first instance.

[47] While we accept that this Court has a general discretion to admit fresh evidence under the settled principles of **Ladd v Marshall**, these principles are relevant to Ewart's application not as rules, but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit him to rely on the evidence not before the court below. It is also well established that an appellate court must not only consider whether the application to adduce fresh evidence meets all three of the **Ladd v Marshall** criteria but also whether ultimately it is in the interests of justice in the appeal to allow the fresh evidence to be adduced.

[48] This brings us to focus on the evidence which lies at the heart of Ewart's application to adduce fresh evidence of the mental condition of Anita and the cautions registered at the Land Registry. We need to examine the relevant paragraphs of the judgment of the court below.

[49] It is necessary to reproduce material aspects of the learned judge's judgment that are relevant to these applications. The learned judge states:

> "20. *There is no evidence before the Court to show that there were any registered leases, charges, encumbrances, conditions or restrictions noted on the Land Register of the*

property when Anita Robateau transferred it to her son, Allen Robateau, the Claimant. Neither was the Court provided with any copy of the transfer instrument form for the property from Anita Robateau to Allen Robateau, even though the said Instrument dated November 14, 2017, was listed in the List of Documents provided by the Claimant to the Defendant dated July 31, 2019.

21. The Claimant conceded that the Defendant had placed a caution on the property dated May 31, 2018. The caution was listed in the List of Documents provided by the Claimant to the Defendant; however, the caution was not produced to the Court by either party.

22. Legally, the position as to the absolute ownership of the property is clear. Allen Robateau is the registered owner of the parcel of land which is the subject of this claim. There is nothing in evidence in this claim to the contrary.

…

IS THE TRANSFER OF THE LAND VOIDABLE?

42. The Defendant alleges in his Defence that in November 2017, at the time that his mother transferred the land to the Claimant, she was "advanced in age and lacked the mental capacity due to disease of mind brought on by her age, to deal with and dispose of the property".

43. The Defendant says further in his Defence, that the transfer was not made with the "free will" of his mother because at the material time, the Claimant "used undue influence on his mother and by that undue influence overpowered her mind so that the transfer was not made with the free will and consent of the mother".

44. Ironically, the Defendant brought his mother to court as a witness to bolster his claim regarding the granting of a life interest to him. The Witness Statement of Anita Robateau was sworn on September 12, 2019. At the time of the trial, a year later, the witness was visibly distraught, disoriented and confused as to where she was and why and was therefore unable to be sworn in and give evidence and her witness statement could not be tendered in evidence.

45. The Defendant says nothing at all about the undue influence which was allegedly exercised by the Claimant on their mother, in his witness statement which was tendered in evidence. There is not a single statement or reference in his witness statement to any undue influence that his brother purportedly used to overpower his mother's free will when she transferred the property to him.

46. The Defendant did not provide the Court with any medical or documentary evidence to prove that his mother did not at the time "have a disposing mind

and memory" because she "lacked the mental capacity due to disease of mind."

47. Under cross-examination, the Defendant admitted that he had provided no medical or documentary evidence to support his contention that his mother had schizophrenia. Neither did Ernesto Castillo provide any such evidence nor under cross-examination, he merely said that she now had a tendency to repeat herself and ask the same questions again and again.

48. There was some testimony given by the Claimant that Anita Robateau had voluntarily undergone some period of time in a psychiatric institution in the United States, but no date or time was provided, nor was any evidence tendered as for the reason for this, and neither was any medical evidence tendered in respect of the same. I found the Claimant to be candid with the admission that his mother had in fact been hospitalized in the United States of her own volition.

49. There was no evidence provided on which the Court could make a determination that the transfer is voidable because it was made by Anita Robateau to Allen Robateau at a time when, or in circumstances in which she lacked the capacity to understand what she was doing, nor was there evidence to substantiate the Defendant's contention that the Claimant exercised "undue influence" to cause his mother to transfer the absolute ownership of the property."

[50] As alluded to it is also imperative that we look at the affidavit evidence of Ewart in support of the application. The peak of the affidavit speaks to the matters that Ewart wishes to be adduced as fresh evidence.

[51] For what it is worth, we will reproduce a few of the paragraphs of the affidavit that are relevant to the fresh evidence application. We now do so –

"12. My estranged brother Allen who has and continues to live in the States, and is the Respondent herein, took my elderly and forgetful mother while I was at work and absconded with her to the United States of America in total secrecy and without the knowledge of any of us.

13. That my estranged brother Allen, the Respondent herein, shortly after he deceptively got the title to the Chancellor St. property, placed my mother in a mental illness institution namely; Ocean View Psychiatric Hospital, where she was admitted for "schizophrenia". I annex and exhibit herein marked ***"ER1".***

14. I pay particular deference to the ultimate fact above, that Allen, the Respondent herein, failed and derelicted his legal duty to disclose this to this Honourable Court,

by not only deliberately but also dishonestly withholding this substantial and important material fact from the Court and myself as a party herein.

15. *Anyone could have easily like Allen did, dishonestly take my elderly, feeble and forgetful mother to the Lands Department and got her to effect a title transfer over their name. But I would not do that, because one should never do that to their mother, and I do not possess that kind of posture and frame of illegality like he does.*

16. *My brother, Mr. Michael Robateau and his wife Mrs. Yola Robateau would like to be introduced to and testify before the Honourable Court as they received her from said mental institution where Allen had placed her incommunicado and away from all others knowledge and doing. They further picked up her travel documents from a Notary Public in the United States after challenging Allen for the unlawful withholding of her passport. They only found her after searching for her in the system using her U.S. Social Security.*

17. *The Cautions were placed on the property at the Ministry of Natural Resources, one by myself on 31st of May 2018, and one by my mother Anita Robateau, and myself jointly 22nd November 2019 which I believe is still in place. I annex and exhibit herein marked* ***"ER2".***

18. *In the above Caution joint signed by me and my mother; my mother signed and affirmed sworn, that her estranged son Allen, the Respondent, coerced her into signing a transfer and took her to the States against her wishes placing her into a psychiatric patient's home and that she wanted to recover back the land title.*

19. *My brother Ernesto Castillo, has video evidence a recording of her confirming that she did not wish to transfer the property and simply did not know Allen did that.*

20. *Dr. John Sosa, the pre-eminent neurologist in the nation of Belize has also certified my mother Anita Robateau as having suffered from advanced Dementia, which I understand further confirms that she did not, was not, and could not have been in the right compos mentis to transfer anything. I annex and exhibit herein marked* ***"ER3".***

21. *The Respondent, Allen, committed various unlawful acts in pursuant of swindling me and my mother who happens to be his own mother as well, out of our protected legal rights and interests therein to the property. He withheld important and credible information under a duty of disclosure not only to myself as a party therein, but also to the Honourable Court. It is within the interest of justice and in accordance with the law and the Rules of this Honourable Court. It is within the interest of justice and in accordance with the law and the Rules of this Honourable Court that these fresh evidence be added and adduced.*

22. *I wish to bring these directives, testimonies, and evidences to the attention of this Honourable Court and parties involved in this matter, and it is my duty to disclose*

all relevant materials in these proceedings including those which are more newly discovered."

[52] In objecting to Ewart's application to adduce fresh evidence, Allen in his affidavit deposed as follows:

> *"3. That the evidence the Applicant/Appellant is seeking to adduce fresh evidence were available before the trial started, after the trial started and before the judge gave her decision and that the decision was filed at the Court's registry.*
>
> *4. That the evidence is such that, if given, would probably not have had an important influence on the outcome of the case.*
>
> *5. That I have incurred additional legal expenses in responding to this application."*

[53] It is trite that in order to prosecute an application to adduce fresh evidence there must be evidence on affidavit which undergirds the application.

[54] However, the evidence deposed to by Ewart simply does not meet the threshold of the first limb of the **Ladd v Marshall** test. As is evident, Ewart's affidavit does not indicate the matters that are cognisable under the first limb. Nowhere in the affidavit does Ewart address the issue of whether the evidence sought to be adduced could not have been adduced with reasonable diligence for use at first instance. This was critically important to state and proved fatal to the application.

[55] This is so even after Allen, in his affidavit, had taken issue with the materials deposed to in Ewart's affidavit.

[56] In **Lall v Ramsahoye**[6]**,** Nelson JCCJ at paragraph 18 addressed fresh evidence and stated:

> *"[18] By application dated 13th April 2016, Dr Ramsahoye sought to adduce fresh evidence in the appeal by seeking an order admitting a 17th February 2014 publication in the Kaieteur News which he alleged was defamatory of him. The Court was urged to make the order on the basis that it was published subsequent to the High Court proceedings and had not come to Dr Ramsahoye's attention until after filing these proceedings but was relevant to the issue of damages. Having considered the application and oral arguments, this Court dismissed the application as the matters complained of took place well before the commencement of*

[6] Glen Lall and National Media and Publishing Company Limited v Water Ramsahoye (2016) CCJ 18 (AJ)

proceedings in the Court of Appeal and before that court delivered its judgment. No attempt had been made to bring the offending publication to the notice of the Court of Appeal. In these circumstances the Court considered that the application had not complied with the requirements for the admission of fresh evidence as outlined in the oft cited case of Ladd v Marshall.

[23] The dismissal of the application was without prejudice to any right to institute contempt proceedings having regard to the fact that the publication was covered by the ex parte injunction granted by Kissoon J and made permanent by Persaud J."

[57] Having failed to meet the threshold of the first limb, we need not go on to consider whether Ewart has satisfied the second prerequisites of **Ladd v Marshall** since he has failed to surmount the critical first limb.

[58] In his affidavit in support of the application to adduce fresh evidence. The matters to which Ewart speaks do not indicate the date on which he became aware of this 'fresh evidence'. At the very least, he should have indicated that the evidence could not be obtained with reasonable diligence. His did not depone to this matter. Each application to adduce fresh evidence has turned on the proper consideration and weighing of all relevant factors and considerations. However, Learned Senior Counsel, Mr. Elrington, did not press these points and it is clear that these matters could have been raised before the High Court and the mental capacity of Anita was not raised in the Court of first instance. We have not been provided with a scintilla of information to indicate that the evidence could not with reasonable diligence be obtained.

[59] In fact, Mr. Elrington, in his oral arguments stopped short of accepting those difficulties with the application to adduce fresh evidence. With the greatest respect to Learned Senior Counsel, Mr. Elrington, he quite properly did not seem to press this point vigorously. Perhaps with very good reason since there simply was no evidential basis to undergird the application to adduce fresh evidence.

[60] In all of the circumstances, the application to adduce fresh evidence fails.

APPLICATION TO STRIKE

[61] We turn now to the application to strike**:**

[62] We examine Allen's affidavit in support of the application to strike, in support Allen disposed as follows:

> *"3. That I have been duly informed by my attorney and do verily believe that since the claim was to delivery of possession of property, the Appellant could have file a counterclaim seeking orders and declaration but, despite being informed by the Respondent/Claimant on page 21 of the transcript, under the heading Notes for Defendant (Fixed Date Claim Form) that he can so file, chose not to.*
>
> *4. That I have been duly informed by my attorney and do verily believe that the one ground of appeal, listed at #3 ought to be dismissed because the learned trial judge could not have misdirected herself on the law governing equitable estoppel given that no counterclaim was filed seeking orders or declarations on the issue of equitable estoppel, the Promisor was not a party to the claim, there was no evidence as to compliance with Registered Land Act evidencing any interest in the property being registered no allegation that I had knowledge of the promise, the Appellant said my mother was evidence and no allegation of fraud of mistake occurring at the Lands Department was made in a counterclaim.*
>
> *5. That I have been duly informed by my attorney and do verily believe that there was no witness statement showing any medical evidence from a doctor that at the time of the transfer the Transferor, being Anita Robateau, did not have capacity to transfer the property to me to support the Appellant's case at trial that there was undue influence.*
>
> *6. That I have been informed by my attorney and verily do believe that the relief sought at 4(b) ought to be dismissed because the Appellant is seeking to have a second bite of the cherry by asking the Court of Appeal to grant him declarations he never sought in trial in a counterclaim."*

[63] Ewart's further affidavit in objection to the application to strike out attempt states as follows:

> *"3. I reject and refute in its entirety paragraphs 1 to 8 of his preliminary objection.*
>
> *4. I therefore strongly say that my Appeal, this Action No. 1 of 2022, filed by my Notice of Appeal dated 1st March 2022 is properly before the Court.*
>
> *5. I believe that this is a ploy by the Respondent to evade the due hearing of this Appeal and that he is fearful of the Court hearing the evidence and facts which I*

have tendered and that it will expose his unlawful conduct especially relating to his alleged acquisition of the title.

6. *That Allen Robateau wilfully dishonestly and deliberately derelict in his duty of full disclosure to the Court because he withheld evidence from the Honourable Court because it was adverse to him and which was of such great value that it would have had a total material difference in the outcome."*

Ewart in his affidavit in objection to the application to strike out attempt, filed on 3rd August 2023, states:

"10. In my grounds of Appeal, I stated explicitly that my beloved mother, the registered owner, both requested and permitted me to build my dwelling house on her land. That I did so in her presence and with her knowledge and approval and that she also moved into the house sometime after in full compliance and acknowledgement of this. I therefore pleaded facts from which the Court could have found and ought to have found that I have an overriding equitable interest which would amount to more than but at very least a vested life interest in the subject property.

11. The Defendant, Allen Robateau, never raised the point that I had no Claim before the Court of Trial. That is when he ought to have raised that claim. The learned trial judge had not held that the Claim disclosed no Cause of Action.

12. Furthermore, the Affidavit of Allen Robateau as ordered by the Court for him to file is today out of time as it is still not marked "Filed" with the Stamp of the Court of Appeal, therefore it is out of time and I strongly depose it does not even exist for the purposes of this hearing or any hearing of the Court. That his Notice should not stand and should be immediately desisted."

[64] It is well settled that striking out a claim or appeal is a draconian step and care must be taken before exercising this power.

[65] Allen's application to strike out is based on allegations that are at the heart of the underlying dispute. We are of the considered view that the application to strike out is misplaced. There are serious issues that should be ventilated in this appeal and we will go on to explain why we are of this view.

[66] In Allen's preliminary objection what he is in effect seeking from this court is for Ewart's appeal to be struck. We have treated his preliminary objection as an application to strike.

[67] The power of the court to strike out a claim is provided for by Rule 26.3(1) of the Supreme Court Rules which states as follows:-

"In addition to any power under these Rules, the court may strike out a statement of case or part of the statement of case if it appears to the court that –

(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or …"

[68] It is settled law that the power to strike out a claim equally applies to the ability to strike an appeal.

[69] In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al, Civil Appeal No. 20A of 1997,** Byron CJ, as he then was, enunciated the test that should be applied in an application to strike. He said:

"This summary procedure should only be used in clear obvious cases, when it can be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court striking out."

[70] In **Tawney Assets Limited v East Pine[7] ECSC**, the Court held in relation to an application to strike stated as follows:

"…the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."

[71] It is the law that an appeal should not be struck unless it is clear that the issues of law or fact that are raised are spurious. This discretion to strike is one which a court should exercise very sparingly.

[7] Tawney Assets Limited v East Pine Management Limited et al HCVAP 2012/007 para. 22 pg 13

[72] We acknowledge that the Court has jurisdiction to strike out the notice of appeal where the appeal is plainly not competent, or where the appeal is frivolous and vexatious or an abuse of process of the court. The Court will only exercise its power to strike out a notice of appeal in "clear and obvious cases."

[73] The matters to which Allen deposes in his affidavit in support of the preliminary objection to strike out the application are matters that concern the substantive merits of the appeal and, as alluded to earlier, must be interrogated in the appeal.

[74] Having reviewed Allen's affidavit evidence and Ewart's evidence in opposition to the application to strike, we are of the view that the matters to which Allen has deposed can only be tested in a full hearing of the appeal and not on an application to strike. It is clear that Allen deposes to matters that do not ordinarily undergird an application to strike. These are matters that should be resolved at the full hearing of the appeal, at which the correctness of the learned judge's findings of fact or law should be tested.

[75] This substantive appeal seeks to interrogate several findings of law and fact made by the learned judge and stated in the written judgment. It is well-nigh impossible if not improper for any appellate court to ignore those types of matters and to strike out the appeal without examining the complaints to ascertain whether they are meritorious.

[76] Consequently, Allen's application to strike out Ewart's appeal fails.

[77] We now address the issue of costs.

COSTS

[78] Both Ewart and Allen have failed in their respective application. In the circumstances, the appropriate order is that each party should bear its own costs.

[79] We gratefully acknowledge the assistance of all learned Counsel.

Louise Esther Blenman
Chief Justice

I concur.

Marguerite Woodstock Riley
Justice of Appeal

I agree with the decision and reasons expressed by the Hon Chief Justice and have nothing to add.

Sandra Minott-Phillips
Justice of Appeal