IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 41

Civil Appeal No 174 of 2018 (Summons No 33 of 2019)

Between

ANAN GROUP (SINGAPORE) PTE LTD

… *Appellant*

And

VTB BANK (PUBLIC JOINT STOCK COMPANY)

… *Respondent*

In the matter of Companies Winding Up No 183 of 2018

Between

VTB BANK (PUBLIC JOINT STOCK COMPANY)

… *Plaintiff*

And

ANAN GROUP (SINGAPORE) PTE LTD

… *Defendant*

GROUNDS OF DECISION

Version No 1: 27 Oct 2020 (22:41 hrs)

[Civil Procedure] — [Appeals] — [Adducing fresh evidence on appeal]

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Anan Group (Singapore) Pte Ltd
v
VTB Bank (Public Joint Stock Co)

[2019] SGCA 41

Court of Appeal — Civil Appeal No 174 of 2018 (Summons No 33 of 2019)
Sundaresh Menon CJ, Steven Chong JA and Quentin Loh J
24 May 2019

23 July 2019

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 It would be stating the obvious that the quality of evidence adduced in any given case will have a material if not a critical bearing on its outcome. Cases are fought and more importantly decided on the basis of the evidence before the court. For this reason, the common law has developed rules and exceptions for the admission of fresh evidence following a trial or a hearing on the merits in order to balance the importance of finality in litigation and the proper and fair administration of justice.

2 Not infrequently, applications to introduce new evidence take place following a change of counsel. New arguments are raised for the appeal and quite often, such new arguments require fresh evidence to be adduced. Even though such fresh evidence might have been reasonably available to the parties

for the hearing below, it was overlooked simply because it was not relevant for the purposes of the arguments which were pursued below. The case before us was precisely one such case and the rule in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall"*) was raised by the respondent to resist the admission of fresh evidence to mount a new argument for the purposes of the substantive appeal. The key question before us was whether the *Ladd v Marshall* requirements should be strictly applied in the context of a winding-up order that was made pursuant to a statutory demand.

3 We heard and allowed the application on 24 May 2019 with brief oral grounds. In our view, the rule in *Ladd v Marshall* is to be applied contextually especially in circumstances such as the present case where there has been no trial and where there is potentially a dramatic difference in the balance of prejudice depending on the admission or exclusion of the fresh evidence. In such a situation, the fact that the evidence could have been adduced before the judge should not foreclose the grant of leave to adduce it for the purposes of the appeal. We also stated that we would issue detailed grounds in due course to fully explain our decision and to reconcile the different approaches to the application of the rule in *Ladd v Marshall* under different contextual settings. This, we do now.

Background facts

4 It is necessary to set out the background facts that gave rise to the present application as the relevance of the new evidence sought to be adduced can only be properly appreciated in that context.

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The relationship between the parties

5 The appellant in the substantive appeal and the applicant in this summons is Anan Group (Singapore) Pte Ltd ("Anan"), a Singapore holding company. The respondent in both the substantive appeal and this summons is VTB Bank (Public Joint Stock Company) ("VTB"), a state-owned Russian bank. On 3 November 2017, Anan and VTB entered into a global master repurchase agreement ("GMRA") under which Anan would sell VTB global depository receipts ("GDRs") of shares in EN+ Group PLC ("EN+") and then repurchase the GDRs from VTB at a later date at pre-agreed rates. The pre-agreed rates that Anan would need to pay VTB at the date of repurchase amounted in essence to the original purchase price paid by VTB plus interests and other costs. Thus, it was clear that despite the structure of the transaction as a sale and repurchase, this was in substance a loan from VTB to Anan.

6 Under this arrangement and according to the GMRA, Anan was under an obligation to maintain sufficient collateral, with the level of collateral being measured by an indicator known as the Repo Ratio. The Repo Ratio is calculated based on the purchase price of the GDRs under the GMRA plus accrued interest, divided by the prevailing value of the GDRs.[1] Under the GMRA, Anan was required to maintain the Repo Ratio at a level below what is known as the Margin Trigger Repo Ratio of 60%, failing which VTB could exercise its contractual right to call on Anan to top up the amount of collateral.[2] Anan was also under an obligation to maintain the Repo Ratio at a level below what is known as the Liquidation Repo Ratio of 75%. The calculation of

[1] Cl 20 "Definitions", Part 2 Annex 1 to GMRA, reply affidavit of Stanislav at p 62.

[2] Cl 2(a), Part 2 Annex 1 to GMRA, reply affidavit of Stanislav at p 46.

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whether the Repo Ratio rises above the Margin Trigger Repo Ratio of 60% or whether it rises above the Liquidation Repo Ratio of 75% differs slightly in that the latter takes into account various additional costs. Failure to top up the requisite amount of collateral when the Repo Ratio rises above the Margin Trigger Repo Ratio of 60% constitutes an event of default under the GMRA,[3] as does the situation where the Repo Ratio rises above the Liquidation Repo Ratio of 75%.[4]

7 Pursuant to the GMRA, Anan sold VTB 35,714,295 EN+ GDRs for approximately US$250m, at which time EN+ shares were worth approximately US$13 per share. A few months later, on 6 April 2018, EN+ shares plummeted to about US$5.60 per share as a result of sanctions imposed on major shareholders of EN+ by the United States Treasury's Office of Foreign Assets Control ("the OFAC sanctions"). On the same day as the OFAC sanctions (*ie*, 6 April 2018), VTB issued a margin trigger event notice, informing Anan that the Repo Ratio was at approximately 74.57%, thus exceeding the Margin Trigger Repo Ratio of 60%. In this notice, VTB asked Anan to top up a cash margin of approximately US$85m by 10 April 2018 purportedly in accordance with cl 2(a) of the GMRA.[5] Anan failed to restore its collateral by transferring the cash margin within the stipulated timeframe.

8 On 12 April 2018, VTB sent a default notice to Anan, designating 16 April 2018 as the early termination date of the GMRA. According to this notice, two events of default had occurred – first, the Repo Ratio had exceeded

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[3] Cl 10(b)(xiii), Part 2 Annex 1 to GMRA, reply affidavit of Stanislav at p 54.

[4] Cl 10(b)(xxiii), Part 2 Annex 1 to GMRA, reply affidavit of Stanislav at p 55.

[5] Reply affidavit of Stanislav at p 79.

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the Liquidation Repo Ratio of 75%, thus constituting a liquidation event and an event of default under the GMRA; second, the Repo Ratio had exceeded the Margin Trigger Repo Ratio of 60% and Anan had failed to top up a cash margin of US$85m by 10 April 2018 as stipulated, and this constituted a further event of default under the GMRA.[6]

9 The legal effect of an early termination under the GMRA was that the repurchase date was brought forward to the early termination date, such that Anan was required to repurchase the GDRs at the original purchase price plus accrued interests to this date.[7] In other words, Anan was compelled to repay the "loan" to VTB on the early termination date. What then occurs in such a case is a setting-off of the payments owed by each party, which the non-defaulting party is entitled to calculate.

10 On 24 April 2018, VTB as the non-defaulting party sent a calculation notice to Anan stating that an outstanding debt of some US$170m was owing. This sum was arrived at by calculating the outstanding amount owed (*ie,* the purchase price plus interests), minus the total value of the GDRs held by VTB, which VTB ascertained to be worth US$2.50 each. VTB had arrived at the figure of US$2.50 by calling for quotations from 14 institutions, of which only two responded with indicative quotes of US$1 and US$5. VTB then purported to take an arithmetic mean of the two quotations to arrive at the valuation of US$2.50 per GDR.[8] It would be self-evident that this arithmetic average was

[6] Reply affidavit of Stanislav at p 81.

[7] Cl 10(b) and (c) of the GMRA, reply affidavit of Stanislav at p 56.

[8] Reply affidavit of Stanislav at p 86.

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erroneous. The average of US$1 and US$5 is US$3 and not US$2.50, though it would appear that this error might not be crucial for present purposes.

11 On 23 July 2018, VTB served a statutory demand for the sum of approximately US$170m, which sum Anan failed to repay within the three-weeks period. This statutory demand then formed the basis of the winding-up petition, HC/CWU 183/2018 ("CWU 183"), presented by VTB against Anan.

The proceedings below and the substantive appeal in CA 174

12 CWU 183 was presented by VTB on 17 August 2018. At the hearing of CWU 183 on 7 September 2018, Anan disputed the debt owed to VTB, arguing that the OFAC sanctions which caused the value of the GDRs to fall was an act of frustration as well as a *force majeure* event. Anan also argued in the alternative that the quantification of the debt of US$170m was erroneous, but this appeared to be a bare assertion focused largely on VTB's unsubstantiated calculations of "hedge unwind costs", "appropriate market", "net value" and the interest rate used.[9]

13 The High Court judge ("the Judge") granted the application in CWU 183 and ordered Anan to be wound up (see, *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250). The main point of contention in that hearing centred on the applicable standard of proof of a disputed debt when that debt is subject to an arbitration agreement between the parties. As this issue is anticipated to take centre stage in the substantive appeal in CA/CA 174/2018 ("CA 174"), we shall say no more of the matter here. The

[9] GD at [23].

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Judge found Anan's arguments on frustration and *force majeure* to be unconvincing. The Judge also found that Anan had deliberately failed to particularise its case on the issue of the quantification of the debt, because it knew that in any case a substantial debt far in excess of the statutory insolvency threshold of $10,000 would be owing and that this debt would provide a sufficient basis for the granting of a winding-up order.[10] We should add that Anan is no longer pursuing the frustration and *force majeure* arguments for the purposes of the appeal.

14 The substantive appeal in CA 174 thus focuses on two issues: first, the applicable standard of proof where a debt governed by an arbitration agreement is disputed; second, whether this standard of proof is met in the instant case given the dispute over the quantum of debt owed by Anan to VTB.

15 The present application was filed by Anan to adduce new evidence for CA 174 in the form of the affidavit of Andrew Ooi Lih De dated 22 March 2019 which exhibited a report prepared by Deloitte (the "Deloitte Report"). The Deloitte Report opines that the GDRs ought to have been valued at between US$8.01 and US$8.68 each as at the early termination date of 16 April 2018. The Deloitte Report further comments on the methodology adopted by VTB in arriving at its valuation of US$2.50. The implications of this are clear – if the valuation in the Deloitte Report were to be adopted, it would mean that the GDRs were collectively worth between US$286m and US$310m as at 16 April 2018, and thus that no debt was due and owing from Anan to VTB at the material time.

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[10] GD at [81].

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16 VTB opposed the application on the basis that the requirements in *Ladd v Marshall* had not been satisfied. Notably, it took the position that the first requirement of non-availability had not been fulfilled – it argued that the Deloitte Report could clearly have been adduced in CWU 183 or before, and Anan has not provided any reasons to explain why it was not adduced before the Judge. On the other hand, Anan argued that the requirement of non-availability should not be applied strictly in the present case given that the hearing below did not have the characteristics of a full trial.

17 It became evident at this juncture that the parties' respective positions were poles apart as regards the applicability of *Ladd v Marshall* to the present summons, and it is to this issue that we shall now examine.

Analysis: the rule in *Ladd v Marshall*

The statutory background

18 It is necessary to first set out the statutory background to the present application, particularly given the recent amendments to the relevant legislation.

19 Section 37 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") makes clear that further evidence may be given on appeal without leave in relation to matters which have occurred *after* the decision of the judgment below, but that for further evidence in relation to matters which occurred *before* the date of such decision, leave must be sought from the Court of Appeal, and such further evidence may only be adduced on "special grounds". Whereas the previous iteration of s 37(4) of the SCJA provided that the threshold of "special grounds" applied only to "appeals from a judgment, after trial or hearing of any cause or matter upon the merits", this phrase has

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since been removed by the Supreme Court of Judicature (Amendment No 2) Act 2018 (Act No 46 of 2018), and the provision which took effect as of 1 January 2019 reads as follows:

> **Hearing of appeals**
>
> **37.**—(1) Appeals to the Court of Appeal shall be by way of rehearing.
>
> (2) In relation to such appeals, the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or a commissioner.
>
> (3) Such further evidence may be given without leave in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (4) Except as provided in subsection (3), such further evidence may be given only on special grounds and with the leave of the Court of Appeal.
>
> …

20 The above is consistent with O 57 r 13(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). The previous iteration of O 57 r 13(2) stated that in an appeal from a "judgment after a trial or hearing of any cause or matter upon the merits", no new evidence may be admitted on appeal except "on special grounds". However, this reference to "judgment after a trial or hearing of any cause or matter upon the merits" was similarly removed from O 57 r 13(2) via the Rules of Court (Amendment No 4) Rules 2018 (S 850/2018) which similarly took effect from 1 January 2019. The version of O 57 r 13(2) in force at the time of the present application as well as at the time of writing thus reads as follows:

> The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit or by deposition taken before an examiner, but no such further evidence (other than evidence as to matters which have

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> occurred after the date of the decision from which the appeal is brought) may be given except on special grounds.

21 The criteria of "special grounds" are not defined in the statutes, but the courts have consistently interpreted it to refer to the threefold requirements in *Ladd v Marshall*: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing; 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 (see *eg*, *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 at [34], *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 ("*ARW"*) at [99]). These three requirements have been referred to respectively as the criteria of non-availability, relevance and credibility.

The genesis and rationale of the rule in Ladd v Marshall

22 It is perhaps apposite to begin our analysis by examining the very case which developed the principles for the admission of new evidence. *Ladd v Marshall* was an appeal against the decision of the trial judge on the issue of whether the appellant had indeed paid a sum of GBP1,000 to the respondent over and above the contracted sum of GBP2,500 for the sale of a house. During the trial, the respondent's wife testified that she had no recollection of the matter. On appeal, the appellant sought to adduce fresh evidence in the form of a further affidavit from the respondent's wife, who had since divorced the respondent, in which she said that she did witness the appellant giving GBP1,000 to the respondent, and that she had given false evidence during the trial out of fear of her then-husband. Denning LJ (as he then was) held that

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where fresh evidence is sought to be adduced, the three conditions quoted above must be fulfilled. The Court of Appeal rejected the application for a fresh trial on the basis of the new evidence, as the third limb was not satisfied – a witness who has confessed to have lied cannot usually be accepted as being credible unless some good reason was shown why a lie was told in the first instance and why the witness will tell the truth on the second occasion, and in the present case there was nothing to show that the respondent's wife was in fear of the respondent or had been coerced to lie at the trial.

23 In *Ladd v Marshall,* Hodson LJ also made reference to the earlier decision of the House of Lords in *Brown v Dean* [1910] AC 373, which was said to have provided guidance on the issue in the speech (at 374, *per* Lord Loreburn LC):

> When a litigant has obtained a judgment in a Court of justice … he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.

Whereas Hodson LJ noted that the requirement of such fresh evidence being "conclusive" had been relaxed by more recent cases, it is clear that the quoted passage reveals the underlying rationale behind the rule in *Ladd v Marshall* – the interests of finality in litigation, as encapsulated by the Latin maxim *interest reipublicae ut sit finis litium*. A final judgment that has been rendered in a litigant's favour should not be disturbed unless there are good reasons to do so.

24 A further and related rationale behind the *Ladd v Marshall* rule can be stated as such. In order to ensure the integrity of the litigation process and the soundness of the resulting judgment, the trial must be conducted on a basis of

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fairness as between the parties and in accordance with the principles of natural justice. By imposing strict requirements that prohibit the introduction of fresh evidence on appeal unless special grounds are shown, the *Ladd v Marshall* rule advances the policy of requiring parties to "advance their entire case at trial, and not deliberately leav[e] over points for the purpose of appeals (and thereby obtaining a 'second bite at the cherry')" (*Blackstone's Civil Practice 2018: The Commentary* (Maurice Kay, Stuart Sime & Derek French, eds) (Oxford University Press, 7th Ed, 2018) at para 72.17, see also *Hertfordshire Investments Ltd v Bubb and another* [2000] 1 WLR 2318 at 2324). In other words, the *Ladd v Marshall* rule incentivises parties to abide by fundamental principles of fairness in their conduct of the trial, and not to resort to the excessive use of strategic ploys to gain unfair advantages. This is in many ways the flipside of the principle of *finis litium* enunciated above – as Laddie J noted in the case of *Saluja v Gill (t/a P Gill Estate Agents Property Services) and another* [2002] EWHC 1435 (Ch) at [24]:

> Litigants should be disciplined into ensuring that they only fight an action once. For that reason in most cases it will be unfair to a litigant to subject him to a retrial, for example, because his opponent culpably failed to put all the best relevant evidence before the court at the first trial. The rule in Ladd v Marshall was applied so as to achieve justice.

25 The two aforementioned rationale behind the *Ladd v Marshall* rule – that of finality of litigation and the interests of fairness for parties to advance their entire case at trial, were more recently espoused in the following dicta of Lord Woolf CJ in *Taylor and another v Lawrence and another* [2003] 1 QB 528 (at [6]):

> The rule in *Ladd v Marshall* is an example of a fundamental principle of our common law – that the outcome of litigation should be final. Where an issue has been determined by a decision of the court, that decision should definitively

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> determine the issue as between those who were party to the litigation. Furthermore, parties who are involved in litigation are expected to put before the court all the issues relevant to that litigation. If they do not, they will not normally be permitted to have a second bite at the cherry: *Henderson v Henderson* (1843) 3 Hare 100. The reasons for the general approach is vigorously proclaimed by Lord Wilberforce and Lord Simon of Glaisdale in *The Ampthill Peerage* [1977] AC 547 … Lord Wilberforce said, at p 569:
>
> > "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes… Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time… But these are exceptions to the general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

26 In our view, it is clear that the interests of finality and the fair administration of justice are desirable and fundamental principles of law which undergird the rule in *Ladd v Marshall*, but that these are not unassailable objectives that would always be consistent with the ends of justice in every case. With this in mind, we now proceed to examine the various contexts in which the application of *Ladd v Marshall* has been relaxed as this analysis provided the underlying basis for our decision in allowing the application.

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Applicability of Ladd v Marshall depending on the nature of the proceedings below

27 It is apparent from the statutory framework set out in s 37 of the SCJA and O 57 r 13(2) of the ROC that there are situations in which the requirements in *Ladd v Marshall* need not be strictly satisfied. Thus, where the evidence relates to matters which occurred *after* the date of the decision below, s 37(3) SCJA stipulates that such evidence may be produced without seeking leave of the Court of Appeal, and there would thus be no need for the applicant to cross the statutory threshold of demonstrating "special grounds". This is not to say however that the appellate court will necessarily *admit* all such evidence, because even in such circumstances the "underlying interest in upholding the finality in litigation should nonetheless be protected" (*BNX v BOE and another appeal* [2018] 2 SLR 215 at [97], citing *Yeo Chong Lin v Tay Ang Choo Nancy and another appeal* [2011] 2 SLR 1157 at [13]).

28 Prior to the recent amendments of the SCJA and the ROC, an applicant seeking to adduce fresh evidence on appeal need not demonstrate "special grounds" unless the appeal was against a "judgment after a trial or hearing of any cause or matter upon the merits". It might thus be said that in such cases, *Ladd v Marshall* was *prima facie* inapplicable. As stated above, the recent amendments to O 57 r 13(2) and s 37 SCJA have deleted the reference to the phrase "judgment after a trial or hearing of any cause or matter upon the merits" (see above at [19]–[20]). As the phrase has been the subject of some judicial scrutiny, we first examine the cases interpreting this phrase before commenting on the implications of the recent legislative amendments. We note at the outset that the parties have not specifically addressed us on these implications.

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29 The distinction between a hearing "of any cause or matter upon the merits" and one that is not so can be most clearly illustrated by considering the case of summary judgments and default judgments. It was held in *Langdale v Danby* [1982] 1 WLR 1123 that *Ladd v Marshall* applies to appeals against summary judgment, because such a judgment is concerned with the existence of triable issues and is therefore based on the merits of the case, and disposes of the action in the same way as a final judgment at trial (at 1132):

> When judgment given for a plaintiff under Ord. 86, r. 4 is under appeal, is this "an appeal from a judgment after trial or hearing of any cause or matter on the merits" (Ord. 59, r. 10(2))? These are the critical words to be construed. There is plainly "an appeal from a judgment." In the light of the distinction drawn in Ord. 86, r. 4 between "the hearing of [the] application" and "a trial of the action," the judgment is not "after trial"; but I can see no plausible argument that it is not "after... [the] hearing of any cause." *"Cause," by definition, includes an action and since a summary judgment for the plaintiff under Ord. 86, r. 4 disposes of the action it can only result from a hearing of the action.* The only point of construction which, at first blush, might seem debatable, is whether the hearing is "on the merits." But, on analysis, it seems to me that these words are as clearly apt to embrace a hearing under Order 86 which results in judgment for the plaintiff as the trial of an action. *What the judge must do before he gives judgment for the plaintiff under rule 4 is to be satisfied that the merits of the plaintiff's claim are duly verified as required by rule 2 and, more importantly, that the defendant has failed to mount a sufficient challenge to those merits on the law or on the facts to show that there is any issue or question in dispute which ought to be tried. In other words, the judge can only give judgment for the plaintiff if satisfied that there are no such merits on the defendant's side as to warrant giving leave to defend.* In the ordinary use of language, a hearing leading to the conclusion that there are no merits to be tried is just as much a hearing "on the merits" as a full scale trial of disputed issues. [emphasis added]

The above position was subsequently endorsed by this court in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053 at [37].

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30 By contrast, *Weller v Dunbar* [1984] Lexis Citation 377 held that an order setting aside a default judgment is not a decision after a hearing on the merits, even though the merits are taken into account in deciding whether to set aside the default judgment, because the hearing on the merits in the shape of the trial of the action is yet to come. Relatedly, it has also been suggested that where an application for summary judgment is refused, or where conditional leave to defend is granted, such a decision is not arrived at after a hearing on the merits because the merits remain to be decided at the trial that follows (*Singapore Civil Procedure 2019* vol 1 (Chua Lee Ming J gen ed) (Sweet & Maxwell, 2019) at para 57/13/10). This proposition appears to originate from the learned authors of *The Supreme Court Practice 1991* (Jack Jacob eds) (Sweet & Maxwell, 1990) and finds support in English Court of Appeal cases such as *Woodhouse v Consolidated Property Corporation Ltd* [1993] 1 EGLR 174 and *Whitehead Engineering Co v Barking Breweries Ltd* [1988] Lexis Citation 1171. However, the English Court of Appeal has in other cases doubted the soundness of this proposition, observing that whether or not a hearing on the merits has taken place should depend on the nature of that hearing and not its outcome (see *eg, Pearce v Ove Arup Partnership Ltd and others* [2000] Ch 403 at 418–419; *Electra Private Equity Partners v KPMG Peat Marwick* [2001] 1 BCLC 589 ("*Electra*") at 618–619). This thus appears to be an open point of law that remains to be settled. Since it is not of direct relevance to the present application and the parties have not addressed us on this point, we leave it to be resolved in an appropriate case in the future.

31 In an appeal that does not arise from a judgment or hearing on the merits, whether fresh evidence should be admitted lies in the unfettered discretion of the court. Thus, in interlocutory appeals, the strict principles of *Ladd v Marshall* are inapplicable (*JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others*

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[2018] 2 SLR 159 ("*JTrust Asia*") at [54]). Even where the *Ladd v Marshall* principles have been applied, the first criterion of non-availability is often relaxed in recognition of the fact that interlocutory matters are "contested at an early stage of the litigation" where it may be "unjust to expect a party to have all his tackle in order" (*JTrust Asia* at [55], endorsing *Electra* at 621*a–b per* Auld LJ).

32 The position that has emerged from the recent cases is more nuanced. The distinction is not so much that *Ladd v Marshall* is inapplicable where the appeal is not against a judgment after a trial or a hearing on the merits, but rather that in such cases it is in the court's discretion as to whether the application of *Ladd v Marshall* is justified, and if so to what extent. It remains appropriate in such cases to use the *Ladd v Marshall* conditions as a guideline, or to apply the conditions with suitable modifications. This can be illustrated with a few notable decisions of this court.

33 In *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR(R) 392 ("*Lassiter*"), this court considered the applicability of *Ladd v Marshall* to a registrar's appeal. It was held that a registrar's appeal ought not to be treated in the same way as an appeal from the judge to a Court of Appeal, as the registrar is discharging a delegated function and there is no applicable provision like s 37(4) of the SCJA or O 57 r 13(2) of the ROC which stipulated that a judge in chambers should not receive further evidence on appeal in the absence of "special grounds". However, the court in *Lassiter* nonetheless held that reasonable conditions must be set and a party should not be permitted to bring in fresh evidence as he pleases. Thus, whilst it would not be appropriate to impose the first condition of *Ladd v Marshall* strictly, the second and third conditions remain relevant (at [20]–[25]). *Lassiter* was subsequently clarified

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in *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] 1 SLR(R) 1133 ("*WBG Network*") at [11], which similarly concerned a registrar's appeal to a judge in chambers. This court in *WBG Network* emphasised that the decision in *Lassiter* must be seen in the context of the specific circumstances before it, being an appeal against an assessment of damages from a lengthy action in tort and in which oral evidence was adduced. Thus, *Lassiter* does not stand for the broad proposition that the second and third conditions in *Ladd v Marshall* must apply in all circumstances, whether they be appeals from an assessment of damages before the registrar or in respect of interlocutory applications. Crucially, this court in *WBG Network* also opined as follows (at [13]–[14]):

> 13 *Lassiter* thus recognised a distinction between the standard to be applied in appeals where there had been the characteristics of a full trial or where oral evidence had been recorded (for example, in proceedings of inquiries or, as in *Lassiter*, in an assessment of damages) and those that were interlocutory in nature. As a result, *one might not unreasonably conclude that there is a distinction between the standard to be applied for the adducing of fresh evidence in cases which are similar on the facts with Lassiter (for example, in assessments of damages or inquiries), in which the second and third conditions of Ladd v Marshall should strictly apply and those which are similar to Lian Soon Construction (for example, interlocutory matters), in which the court would be allowed to exercise its discretion more liberally*. The existence of a wider discretion in the latter situation however, does not mean that *Ladd v Marshall* cannot apply in such circumstances. Instead, *the existence of such wider discretion would mean that it would be left to the court hearing any particular matter to decide whether the facts justified the application of Ladd v Marshall (and if so, to what extent)*.
>
> 14 A party wishing to adduce further evidence before the judge in chambers in cases where the hearing at first instance did not possess the characteristics of a trial might still have to persuade the judge hearing the matter that he had overcome all three requirements of *Ladd v Marshall* if he were to entertain any hope of admitting the further evidence because the judge was entitled, though not obliged, to employ the conditions of *Ladd v Marshall* to help her decide whether or not to exercise her discretion to admit or reject the further evidence. In such a

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> case, if the appellant could not persuade the judge that the conditions, if applied, would result in his favour, then it would be unlikely that the judge would allow his application to adduce the fresh evidence.
>
> [emphasis added]

34 The current position was succinctly summarised by the High Court in *Park Regis Hospitality Management Sdn Bhd v British Malayan Trustees Limited and others* [2014] 1 SLR 1175 ("*Park Regis*") at [28]:

> 28 I briefly summarise the following steps of analysis which could therefore be employed in deciding whether or not the evidence would be admitted:
>
> (a) Firstly, there is a distinction to be drawn between appeals from trials and appeals from other matters. Only in the former would the *Ladd v Marshall* Test ([23] *supra*) apply strictly.
>
> (b) Second, there is a distinction to be drawn between matters which had characteristics of a full trial or where oral evidence had been recorded, and matters which were generally "interlocutory" in nature. As a result of the decision in *Lassiter*, in the former situations the second and third conditions of the *Ladd v Marshall* Test would apply.
>
> (c) Third, in matters which were generally interlocutory in nature, the court was entitled, though not obliged, to employ the conditions of the *Ladd v Marshall* Test to help decide whether or not to exercise the discretion to admit or reject the further evidence.

35 It is apparent from the foregoing that whether or not an appeal is against a "judgment after a trial or hearing of any cause or matter upon the merits" does not necessarily determine the applicability or otherwise of *Ladd v Marshall.* Rather, consistent with the summary in *Park Regis* which this court endorsed in *ARW* at [100], the cases should be analysed as lying on a spectrum. On one end of the spectrum, where it is clear that the appeal is against a judgment after a trial or a hearing having the full characteristics of a trial (*ie,* which involves

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extensive taking of evidence and particularly oral evidence), then it is clear that *Ladd v Marshall* should be generally applied in its full rigour. On the other end of the spectrum, where the hearing was not upon the merits at all, such as in the case of interlocutory appeals, then *Ladd v Marshall* serves as a guideline which the court is entitled but not obliged to refer to in the exercise of its unfettered discretion. For all other cases falling in the middle of the spectrum, which would include appeals against a judgment after a hearing of the merits but which did not bear the characteristics of a trial, then it is for the court to determine the extent to which the first condition of *Ladd v Marshall ie*, criterion of non-availability should be applied strictly, having regard to the nature of the proceedings below. In this regard, relevant (non-exhaustive) factors would include: (a) the extent to which evidence, both documentary and oral, was adduced for the purposes of the hearing; (b) the extent to which parties had the opportunities to revisit and refine their cases before the hearing; and (c) the finality of the proceedings in disposing of the dispute between the parties.

36 Once the type of proceedings appealed against are envisaged as lying on a spectrum in the above manner, it becomes clear that the recent amendments to the SCJA and the ROC and the deletion of the reference to "judgment after a trial or hearing of any cause or matter upon the merits" need not change the judicial philosophy adopted in the cases canvassed above. Section 37 of the SCJA and O 57 r 13(2) of the ROC as amended would require all parties seeking to adduce fresh evidence on appeal to seek leave of the Court of Appeal before producing such evidence, regardless of the nature of the decision appealed against. The amended provisions do not however preclude the courts from taking a nuanced approach towards the application of the *Ladd v Marshall* principles in determining whether special grounds exist for the introduction of fresh evidence, and in particular by taking into account the nature of the

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proceedings appealed against. We believe that the approach summarised at [34]–[35] above is a principled one that aptly balances the interests of finality in litigation with the need for a court to consider all relevant evidence in the exercise of its appellate jurisdiction.

Cases where Ladd v Marshall applied in a nuanced manner in the interests of justice

37 The above analysis, which focuses on the nature of the proceedings giving rise to the judgment appealed against, is only one facet of the inquiry which the court must undertake in determining the rigour with which the *Ladd v Marshall* principles should be applied. The cases reveal that even after the nature of the proceedings below have been considered, the fulfilment of the *Ladd v Marshall* conditions does not bind the court's hands in admitting fresh evidence, and conversely the court is not prevented from admitting fresh evidence even in the absence of strict compliance with these conditions. Rather, the court retains its overarching discretion to act as the interests of justice require, which includes the discretion to admit new evidence despite the applicant's failure to satisfy the conditions of *Ladd v Marshall*. Thus, this court has rightly cautioned that the *Ladd v Marshall* test should not be applied rigidly as if it were a statutory provision *(Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR(R) 637 ("*Cheng-Wong Theresa*") at [39]; *GAK v GAL* [2013] SGCA 19 ("*GAK v GAL*") at [32]).

38 The broad overarching principle may be simply stated that fresh evidence can be admitted, notwithstanding the non-compliance of the *Ladd v Marshall* conditions, in exceptional cases where it would affront common sense or a sense of justice to refuse leave to adduce fresh evidence (*Chan Fook Kee v Chan Siew Fong* [2001] 2 SLR(R) 143 at [9], echoing Lord Wilberforce in

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Mulholland v Mitchell [1971] AC 666 at 680A). This broad principle can be illustrated more concretely with reference to three categories of cases where *Ladd v Marshall* has been applied in a more nuanced and contextual manner, even though the judgment appealed against arose after trial or a hearing bearing the characteristics of a trial.

Where new evidence reveals fraud perpetrated on the court below

39 First and most notably, this court has held that it will exercise its discretion to admit new evidence even where the first *Ladd v Marshall* condition of non-availability has not been satisfied, where the new evidence revealed that "some deception, fraud or deliberate suppression of material evidence was perpetuated on the trial court by one party" (*GAK v GAL* at [33]). The case of *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu"*) is illustrative. *Su Sh-Hsyu* concerned an appeal against a decision not to set aside judgment entered against the appellant. The respondent had initiated the suit against the appellant for sums allegedly unpaid, and had testified that he had never signed a banking slip which the appellant claimed was evidence that the sum had already been paid. On appeal, the appellant sought leave to adduce an expert report by the Health Sciences Authority ("HSA") showing that the respondent's signature on the banking slip was genuine. This court found that the criterion of non-availability had not been satisfied – since the crux of the appellant's case was premised on the respondent's signature on the banking slip, the appellant should have and could have procured an expert report as to the authenticity of the signature for the hearing below. However, notwithstanding the non-compliance with the first *Ladd v Marshall* condition, this court allowed the HSA report to be adduced on the basis that it uncovered a possible fraud

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perpetrated by the respondent, and the court cannot sanction a judgment whose foundation has been tainted with fraud (at [36]):

> …the court should always bear in mind that its overriding constitutional remit and objective is to promote, dispense and achieve justice between the parties as well as uphold public confidence in the even-handed observance of the rule of law. This objective is entirely consistent with the policy of *finis litium*. As Laddie J has astutely pointed out in *Saluja v Gill* ([25] supra), the justice of the case usually requires the *Ladd v Marshall* conditions to be applied strictly because it would be unfair to repeatedly subject a litigant to retrial merely upon the discovery of new evidence. In a similar vein, *finis litium* cannot be invariably and/or rigidly imposed to such an extent that would allow a miscarriage of justice to go uncorrected. In particular, where the fresh evidence uncovers the fraud or deception of the other party, and such fraud strikes at the very root of the litigation, then, provided the second and third conditions in *Ladd v Marshall* are cumulatively satisfied, the court would, in exceptional circumstances, be prepared to exercise measured flexibility in relation to the application of the first *Ladd v Marshall* condition (see [37] below). After all, a judgment that is corrupted at its core by fraudulent conduct is tainted in its entirety, and the whole must fail: *Hip Foong Hong v H Neotia and Company* [1918] AC 888 at 894. However, we emphasise that the alleged fraud should strike at the very root of the litigation in the sense that the fresh evidence would be crucial to, or determinative of, the final outcome to be ultimately reached by the court. This requirement is, in fact, very similar to the second *Ladd v Marshall* condition save that the evidence must go to the very heart of the matter: see [15(b)] above. It follows that the court will be extremely reluctant to exercise any latitude where the fresh evidence of fraud pertains only to a collateral or ancillary issue. The necessity for such a stringent approach stems, once again, from the principle of *finis litium* and is in accordance with our earlier observation that the *Ladd v Marshall* conditions should, in the vast majority of cases, be applied strictly.

40 As the quoted paragraph in *Su Sh-Hsyu* reveals, the reason for this relaxed approach towards the first limb of the *Ladd v Marshall* test is easily explicable – whereas *finis litium* is a desirable object in the administration of justice generally, the revelation of fraud perpetrated on the lower court would tip the scales of justice in the other direction. It would clearly be in the interests

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of justice to admit fresh evidence where such evidence would reveal that one of the parties has perpetrated a fraud on the lower court, and to rectify the miscarriage of justice that would otherwise result in allowing a judgment tainted with fraud to stand.

Where a party was prevented from adducing the fresh evidence during the hearing below

41 A second category of cases where non-compliance with the first *Ladd v Marshall* condition would not preclude the admission of fresh evidence relates to situations where the fresh evidence, whilst available at the trial or hearing below, was not allowed to be adduced through no fault of the applicant. Thus, where a party was denied a fair opportunity by the trial judge to put forth relevant facts before the court, or where the trial judge made a decision on a substantive point that parties had not had the opportunity to address, the fact that the first condition of non-availability has not technically been fulfilled should not be held against the applicant (see *GAK v GAL* at [33]; *Wong Phila Mae v Shaw Harold* [1991] 1 SLR(R) 680 ("*Wong Phila Mae*") at [16]; *Cheng-Wong Theresa* at [40]–[45]).

42 In *Cheng-Wong Theresa* for example, the appellant was allowed to adduce new evidence on appeal to show that development approval of a property had been granted by the relevant authorities. Even though evidence of such approval could have been obtained for the trial below, the issue of the approval for the development had not been raised during the hearing, and surfaced for the first time in the judge's grounds of decision. This court noted that if the point had been raised during the hearing, the plaintiff could have easily brought in the new evidence without having to fulfil the conditions in

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Ladd v Marshall. This amounted to "exceptional circumstances" which justified the relaxation of the rule in *Ladd v Marshall* (at [45]).

43 In our analysis, the same outcome in *Cheng-Wong Theresa* could have been arrived at without any "relaxation" of the *Ladd v Marshall* rule, but rather by way of a purposive interpretation of the first criterion of non-availability. The first condition requires that the fresh evidence sought to be adduced could not have been obtained with reasonable diligence *for use at the hearing or trial below* – the party seeking to adduce the new evidence must satisfy the court that he has made all "reasonable cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case" (*Re Lim Hong Kee David* [1995] 4 MLJ 564 at 572, endorsed in *Sim Cheng Soon v BT Engineering Pte Ltd and another* [2006] 3 SLR(R) 551 at [10]). In cases where a party was denied a fair opportunity to advance certain evidence at the hearing, such as where the point was simply not in issue at the hearing, then it is arguable that the evidence could not have been *adduced* at the hearing with reasonable diligence, even if it could have been *obtained*. This is consistent with the interpretation of the criterion of non-availability by this court in *Public Prosecutor v Mohd Ariffan bin Mohd Hassan* [2018] 1 SLR 544 ("*Mohd Ariffan*"), albeit in a criminal context (at [68]–[69]):

> 68 … As a matter of law, however, we consider that when the court determines whether the requirement of non-availability has been satisfied, it should also turn its mind to the issue of *whether the evidence sought to be admitted on appeal was reasonably not thought to be necessary at trial.* If a party ought reasonably to have been aware, either prior to or in the course of trial, that the evidence would have a bearing on its case, and that party fails to make a sufficient attempt to adduce the evidence at trial, this should militate against permitting the party to subsequently have that evidence admitted on appeal. But *where it was reasonably not apprehended that the evidence would or could have a bearing on the case at hand, a different result should ensue. Counsel cannot*

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> *be expected to consider things that, objectively and reasonably, would not have been thought to be relevant to the case.* The determination of whether a party would reasonably not have thought the evidence to be necessary at trial naturally requires consideration of the issues that the party would reasonably have become aware of either before or during the course of trial.
>
> 69 In our judgment, the inquiry as to whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process. Having said that, we think the need for such an inquiry will be rare because the trial judge is, in the general run of things, unlikely to have unilaterally propounded an issue or decided it without the aid of evidence or submissions. But where this does arise, we consider that a party should be afforded the opportunity to belatedly put forward the evidence necessary to address that issue and such evidence should also be found to satisfy the condition of non-availability under *Ladd v Marshall*.
>
> [emphasis added]

44 In other words, where a party was prevented from adducing the evidence at trial through no fault on its part, the first condition of non-availability is actually satisfied, and there is no need for any relaxation of the *Ladd v Marshall* requirements. In any case, whether the analysis be one based on the fulfilment of the criterion of non-availability or a relaxation of the *Ladd v Marshall* rules, allowing applications to adduce fresh evidence in such circumstances is clearly justified. Where a judgment under appeal was rendered in denial of natural justice, then the interests of finality must give way to the greater concern that the parties had reasonable opportunity to advance their entire case at the hearing.

45 We pause to briefly address a related point. Just as a party who was unfairly denied an opportunity to advance his entire case at a hearing should not be prevented from adducing fresh evidence on appeal, conversely, a disappointed party will not be allowed to retrieve lost ground by relying on

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evidence he should have put before the court below, especially when he has expressly elected to withhold that evidence (*JTrust Asia* at [55], *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 at [27]). It is also helpful in this regard to consider the English case of *Khetani v Kanbi* [2006] EWCA Civ 1621 ("*Khetani*"). In that case, the appellant had deliberately chosen to proceed with trial notwithstanding that certain relevant documents did not become available before the trial. Lindsay J (with whom Chadwick and Thomas LJJ agreed) noted (at [28]) that even though the *Ladd v Marshall* conditions had technically been satisfied, in that both parties had sought to obtain the documents before trial with reasonable diligence but were unable to do so, the appellant had resisted adjournment and elected to proceed without the documents in full cognisance of the risks of doing so. Thus, despite the compliance with the *Ladd v Marshall* conditions, Lindsay J opined (at [29]) that it was an abuse of process for a party to deliberately proceed without certain evidence, resisting adjournment for this purpose, and then after losing the case to seek to adduce that evidence on appeal.

Where the subject matter of the dispute was of such a nature that it was in the interests of justice to allow the admission of new evidence

46 In this last and most substantive category of cases, the focus of the inquiry is on the *subject matter* of the dispute. In certain types of cases, and particularly where the stakes of any adverse finding in the absence of the new evidence are especially high, it would be appropriate for the court to relax the *Ladd v Marshall* conditions in the interests of justice. Just as, in the words of Lord Wilberforce in *The Ampthill Peerage* [1977] AC 547 (see above at [25]), there are "cases where the certainty of justice prevails over the possibility of truth", there are also cases where the converse is true, and the interests of *finis litium* must be subordinated to the overriding importance of ascertaining the truth of the matter. We discuss here four subcategories of such cases which have

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been established by the precedents, although we caution that these are not closed categories, and neither does the mere fact of a case falling within one of these categories automatically justify a relaxation of the *Ladd v Marshall* rule.

Cases involving the welfare of children

47 Cases involving the welfare and custody of children would be one such example where it might be important to investigate the possibility of truth at the expense of finality. Thus, the rule in *Ladd v Marshall* has at times been relaxed in the appropriate cases, although not without due regard for the desirability of *finis litium,* as the English Court of Appeal explained in *Re S (Discharge of Care Order)* [1995] 2 FLR 639 ("*Re S (Discharge of Care Order)*") at 646:

> … The willingness of the family jurisdiction to relax the ordinary rules of issue estoppel, and (at the appellate stage) the constraints of *Ladd v Marshall* [1954] 1 WLR 1489 upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstance whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined. The maxim 'sit finis litis' is, as a general rule, rigorously enforced in children cases, where the statutory objective of an early determination of questions concerning the upbringing of a child expressed in s 1(2) of the Children Act is treated as requiring that such determination shall not only be swift and final.

48 Thus, in *Wong Phila Mae* which concerned the custody and care arrangements of children to a divorce, this court found that the appellant should have been granted an adjournment so that further affidavits may be obtained to refute adverse allegations made against her second husband. Given that it was

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not clear whether the High Court judge had disregarded those allegations in arriving at his determination of the dispute, further affidavits were thus allowed to be adduced on appeal so as to ensure that both sides had a fair opportunity of addressing all material facts (at [16]). Similarly, in *Re S (A Child) (Abduction: Custody Rights)* [2002] 1 WLR 3355, the English Court of Appeal considered a case in which a mother opposed her child's return to Israel pursuant to the Hague Convention on the Civil Aspects of International Child Abduction on the grounds of the mounting security threats in Israel, and opined that in a case where interests of the child are engaged alongside the country's international treaty obligations, the court is not likely to refuse to admit fresh evidence (at [26]). Although the application to admit fresh evidence in that case pertained to facts and matters which arose *after* the decision under appeal, it is conceivable that the same principles should apply in the appropriate cases in relation to evidence that existed before the decision under appeal.

49 However, not every case involving the interests of children should see a relaxation of the rule in *Ladd v Marshall* in favour of admitting all evidence that might have a bearing on the outcome of the appeal. As the court in *Re S (Discharge of Care Order)* (at [47] above) took pains to emphasise, the interests of children and the statutory regime governing the proceedings in this area often mean that the finality of proceedings remains a valid if not a heightened consideration. Thus, in *Webster and another v Norfolk County Council and others; Re Webster (Children)* [2009] 2 All ER 1156, after quoting the same paragraph from *Re S (Discharge of Care Order)* on the relaxation of the *Ladd v Marshall* rules, the court nonetheless rejected the biological parents' application to adduce further evidence regarding the cause of their children's injuries which led the court to free them for adoption some five years ago. In doing so, the court found that the criterion of non-availability was not satisfied (at [180]), and

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was also cognisant that as a matter of public policy the finality of adoption orders should only be disturbed in the most exceptional of circumstances (at [148]).

Criminal and quasi-criminal proceedings

50 Criminal proceedings where the livelihood, liberty or even life of the accused person is at stake is also another clear category of cases where *Ladd v Marshall* conditions ought to be relaxed in the appropriate case in the interests of justice, so that the court can consider all material evidence before arriving at a final decision on the accused person's guilt or the appropriate sanction to impose. Thus, in *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410, this court departed from previous authorities which applied *Ladd v Marshall* strictly to applications to adduce fresh evidence in criminal appeals, and took the view that whilst *Ladd v Marshall* conditions were "valid and reasonable considerations", the appellate court had to remain "mindful of the higher burden of proving guilt in a criminal case" (at [7]). This less restricted approach was preferred by the High Court in *Soh Meiyun v Public Prosecutor* [2014] 3 SLR 299, which further stated that the first criterion of non-availability ought not to be held against the accused person, and that an appellate court exercising criminal jurisdiction should generally allow additional evidence which fulfils the second and third *Ladd v Marshall* conditions to be admitted (at [16]):

> In my view, where the fresh evidence would go towards exonerating a convicted person or reducing his sentence, the spirit of greater willingness to admit such evidence on appeal as demonstrated by the Court of Appeal in *Mohammad Zam* is to be preferred. The *Ladd v Marshall* condition of non-availability is designed to prevent the waste of judicial resources that results from reopening cases which ought to have been disposed of the first time around, but there is the countervailing

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> consideration that an erroneous criminal conviction or erroneously heavy punishment will have drastic ramifications for the convicted person. It could spell an unjustifiably lengthy period of incarceration and/or corporal punishment, or in the worst case, death. Even if none of these undeserved penalties ensues, since one of the functions of the criminal law is to label persons as deserving of society's condemnation by reason of their conduct, a conviction carries with it an indelible moral stigma that affects the person's life in many real ways. Hence, an appellate court exercising criminal jurisdiction should generally hold that additional evidence which is favourable to the accused person and which fulfils the *Ladd v Marshall* conditions of relevance and reliability is "necessary" and admit such evidence on appeal.

51 The above approach was endorsed in *Iskandar bin Rahmat v Public Prosecutor and other matters* [2017] 1 SLR 505 (at [72]), and further clarified in *Mohd Ariffan*, in which this court held that the conditions in *Ladd v Marshall* should continue to apply in an unattenuated manner to applications by the Prosecution to admit further evidence in a criminal appeal. In other words, the relaxation of the first criterion of non-availability would only operate in favour of applications by accused persons. This court explained the difference in treatment of applications by accused persons and the Prosecution on the basis of three main reasons (*Mohd Ariffan* at [57]–[60]):

> 57 To begin, as Chao JA emphasised in *Soh Meiyun* (see [47]–[49] above), there is a dire anxiety on the part of the court not to convict an innocent person or to impose a sentence that is out of proportion to the criminality of an offender's conduct. The first and most obvious reason for treading carefully is to avoid the considerable prejudice that would be suffered by an accused person who is wrongfully convicted or who receives a manifestly disproportionate sentence relative to his culpability. As we observed in *Kho Jabing v PP* [2016] 3 SLR 135 ("*Kho Jabing*") at [2], "the cost of error in the criminal process is measured not in monetary terms, but in terms of the liberty and, sometimes, even the life of an individual"…For these reasons, there is lasting wisdom in what has become known as Blackstone's ratio: "[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer" (Sir William Blackstone, Commentaries on the Laws of England

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> vol 4 (Oxford Clarendon Press, 2nd Ed, 1765–1769) at p 352). The law strains against and works doubly hard to prevent any erroneous deprivation of liberty.
>
> 58 A second reason for assessing applications by accused persons more leniently than those by the Prosecution is the disparity of resources between the Prosecution and accused persons generally. The Prosecution works in tandem with law enforcement agencies, including the police, to obtain the evidence needed to build a case against an accused person. The CPC accords the police wide-ranging powers to collect any evidence it deems necessary. … This forms the basis for a reasonable expectation that the Prosecution is in possession of all the evidence it deems necessary to make its case by the time of trial. Conversely, it also justifies a comparatively more accommodating attitude in relation to attempts by accused persons to admit new evidence on appeal.
>
> 59 In addition, we note that the point in time at which the Prosecution formally brings charges against an accused, thereby initiating the criminal litigation process, is a matter that is essentially within the Prosecution's discretion. This means that the Prosecution has the opportunity to ensure that the evidence it has gathered with the assistance of the police is in a satisfactory state before it mounts charges against the accused. … This furnishes yet another reason for recognising that an accused person may not have as full an opportunity to deliberate on his litigation strategy and gather the evidence he wishes to put before the trial judge. It is therefore at least in part to ensure greater parity between the Prosecution and the Defence that more leniency is afforded to accused persons wishing to have fresh evidence admitted on appeal.
>
> 60 Finally, it should not be forgotten that an accused person defending criminal charges experiences a strain and anxiety that is difficult for those who have not endured a similar ordeal to imagine. … It is in this state of considerable mental and emotional distress that the accused has to determine how to run his case at trial and the evidence required to establish it. Fairness demands that we accord sufficient recognition to the harrowing nature of this individual experience and its likely effect on the accused's ability to fully and soundly consider the nature of the evidence he will need at trial.

52 For similar reasons, the *Ladd v Marshall* requirements have also been held not to apply with full rigour in the context of contempt proceedings, given

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the quasi-criminal nature of such proceedings (*Tay Kar Oon v Tahir* [2017] 2 SLR 342 at [29]).

Judicial review cases

53 The English Court of Appeal in *R v Secretary of State for the Home Department ex parte Momin Ali* [1984] 1 WLR 663 at 670 opined that the rule in *Ladd v Marshall* had no place in the context of public law and judicial review, but that the principles therein, namely that there be finality in litigation, remain applicable subject to the discretion of the court to act as the wider interests of justice so require. This was subsequently endorsed in *Regional Centre for Arbitration v Ooi Beng Choo and another* [1998] 2 MLJ 383. There have been as yet no local cases on this issue, but we agree in principle that where wider public interests are engendered, as is often the case in judicial review proceedings, then the court should certainly retain the discretion to admit fresh evidence despite the non-compliance with the *Ladd v Marshall* conditions.

Patent disputes

54 One last notable area of law in which the courts have adopted a nuanced approach to the applicability of *Ladd v Marshall* is that of patent disputes. In *Martek Biosciences Corp v Cargill International Trading Pte Ltd* [2011] 1 SLR 1287 this court noted the differences between O 57 r 13(2) and O 87A r 13(2) of the ROC, which concerned appeals under the Patents Act (Cap 221, 2005 Rev Ed), and acknowledged that proceedings before the Patents Registrar were in some ways akin to a full trial and thus that it would be "highly undesirable to freely permit parties, after the Patents Registrar has decided a matter, to adduce further evidence in an appeal from the Patent Registrar's decision to the High

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Court". However, this court went on to note the special character of patent proceedings (at [14]):

> … A patent will affect not only the parties to the particular patent proceeding in question, but also everyone else. The proprietor of a patent enjoys a monopoly within the jurisdiction. Like trade mark proceedings … patent proceedings have repercussions on the market at large: they concern the state of the patents register, which undoubtedly affects the public's interest.

This court then noted the importance of exercising discretion under O 87A r 13(2) in a principled manner for the sake of certainty, whilst meeting the ends of justice in specific cases, and endorsed the non-exhaustive factors enumerated by Laddie J in *Hunt-Wesson Inc's Trade Mark Application* [1996] RPC 233, a case concerning an appeal against the dismissal of an opposition to a trade mark application registration.

Summary

55 Having briefly canvassed the four areas of law above, we should make some concluding observations before summarising the guiding principles in this area as a whole. There is a common thread running through the four seemingly disparate areas of law – these are cases where, due to the *subject matter* in question, the stakes of the dispute are either particularly heightened for the individuals concerned (as in the cases involving the welfare of children or in criminal and quasi-criminal cases), or where the dispute engenders not just the personal interests of the particular litigants but also the wider public interest (as in the case of judicial review proceedings or patent disputes). In such circumstances, in exercising its overarching discretion to act as the interests of justice require, the court may at times find it appropriate to relax the strict application of the *Ladd v Marshall* requirements, and to allow fresh evidence to

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be adduced notwithstanding the non-compliance of the first criterion of non-availability.

Summary of principles

56 Before turning to the present application, it is appropriate at this juncture to tie up the different threads of analysis above to develop a framework that would provide guidance in future cases. The foregoing discussion reveals a two-step analysis that ought to be considered by a court dealing with an application to adduce fresh evidence on appeal.

57 First, the court should consider the nature of the proceeding below and evaluate the extent to which it bears the characteristics of a full trial, or whether it more closely resembles an interlocutory appeal. In this regard, the remarks in *Park Regis* remain pertinent, and we are of the view that the recent amendments to the SCJA and the ROC do not undermine its soundness (see above at [34]–[36]). In appeals against a judgment after trial or a hearing bearing the characteristics of a trial, the interests of finality assume heightened importance, and the court should apply the requirements in *Ladd v Marshall* with its full rigour, subject to the second stage of the analysis. On the other hand, in interlocutory appeals or appeals arising out of hearings which lack the characteristics of a trial, the court remains guided by the rule in *Ladd v Marshall* but is not obliged to apply it in an unattenuated manner.

58 If having determined at the first stage of the analysis that *Ladd v Marshall* should be applied strictly due to the nature of the proceedings below, the court should then proceed to the second stage of the analysis to determine if there are any other reasons for which the *Ladd v Marshall* requirements should be relaxed in the interests of justice. As canvassed above, we broadly think that

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such cases would fall into three categories – where (a) the new evidence reveals a fraud that has been perpetrated on the trial court (at [39]–[40] above); (b) the applicant was prevented from adducing the fresh evidence during the hearing below in circumstances which amount to a denial of natural justice (at [41]–[44] above); and (c) where the subject matter of the dispute engenders interests of particular importance whether to the litigant or to the society at large (at [46]–[55] above). In each of these categories, the court is entitled to determine whether *Ladd v Marshall* should be relaxed in the particular circumstances of the case so as to achieve justice on the facts.

59 In the final analysis, the court is in every instance conducting a balancing exercise between the interests of finality of proceedings and the entitlement of a successful respondent to rely on a judgment in his favour on the one hand, and the right of the applicant to put forth relevant and credible evidence to persuade the appellate court that the justice of the case lies with him. In this regard, this court's comments in *Mohd Ariffan* on the considerations of proportionality and prejudice are of broader relevance even beyond the scope of criminal cases (at [72]):

> In our judgment, it is also relevant to bear in mind the implications of allowing the application on the course of the proceedings and the position of each party. This requires the court to look prospectively at the likely consequences of a decision to admit the fresh evidence … There are two reasons why such consequences should feature in the court's consideration of whether the evidence should be admitted: first, the need for the expeditious conduct and conclusion of litigation; and second, the prejudice that might be occasioned to the respondent in the application. Put another way, it is relevant for the court to consider the *proportionality* of allowing the application and admitting the further evidence. This requires the court to assess the balance between the significance of the new evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice

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> that might arise from the additional proceedings, on the other …

In assessing the proportionality of the application, it would be pertinent to consider factors such as whether the evidence sought to be adduced could be addressed by the respondent by way of a reply affidavit, for which any prejudice caused to the respondent can be compensated by costs in contrast to the inquiry whether the interests of the applicant or third party would be irreparably harmed should the application be refused. With this in mind, we now proceed to apply the above principles to the case at hand.

Analysis of the present case

60 We consider first the nature of the proceedings below. VTB is certainly right to argue that winding-up hearings are hearings on the substantive merits of the case and go beyond dealing with interlocutory matters of procedure. CWU 183 can thus be distinguished from the proceedings in *Re a Debtor* [1996] 1 WLR 379, in which the court held that a hearing on the application to set aside a statutory demand was not a hearing on the merits, since the existence or otherwise of the underlying debt or counterclaim is not determined by the application but will only arise, if at all, in subsequent proceedings on the bankruptcy petition. However, it is also indisputable that CWU 183 did not bear the characteristics of a full trial. In particular, there was limited taking of evidence and any evidence that was led was purely by way of affidavits, with no oral evidence or cross-examination of witnesses. Further, the timelines leading to the hearing of CWU 183 were very compressed – barely two months passed from the date of the statutory demand to the date of the hearing, which meant that the parties had limited time to refine their cases. Lastly, there is some force in the argument that the winding-up order itself lacks finality to the extent

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that the liquidator can subsequently revisit the same issue of the quantification of debt at the proof of debt stage. Whether a liquidator can do so in respect of a debt premised on a statutory demand does not appear to have been adjudicated upon by our courts, but in our view this would be consistent with a liquidator's statutory and common law duties to examine the basis of every proof of debt filed, which include extensive powers to go behind documents and to re-evaluate even judgments and compromise agreements (see *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 at [20]; Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) r 92).

61 VTB relied on the case of *Foo Peow Yong Douglas v ERC Prime II Pte Ltd and another appeal and other matters* [2018] 2 SLR 1337 ("*Douglas Foo*") in support of its position that *Ladd v Marshall* would apply strictly to an appeal against a winding-up order. In *Douglas Foo,* this court applied the *Ladd v Marshall* test without any discussion on whether it ought to be relaxed given the nature of the proceedings. However, *Douglas Foo* occurred under vastly different circumstances than the present case. The company that was sought to be wound up in that case was a special purpose vehicle set up to hold the investment in property development projects, which projects then spawned several other legal proceedings premised on minority oppression and misapplication of investment funds. The appellant sought to wind up the company on the basis that the substratum of the company had been lost given the end of the development project, and the fact that he had no confidence that the company's directors would ensure proper distribution of substantial sums held in escrow. The company had no objections to being wound up after the dispute over the escrow sum had been resolved. The High Court judge agreed with the company that its substratum was not lost until that dispute had been resolved, and disagreed with the appellant that the past conduct of the

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company's directors meant that they would siphon away its share of the escrow sum. Ultimately, the judge also found that even if the statutory grounds for winding up were technically established, the court retained residual discretion to consider all relevant factors, which in this case included the company's lack of objection to being wound up following the resolution of the dispute over the escrow sum; that winding up the company would unnecessarily complicate a related party's defence in the claim for the escrow funds; and that it would entail unnecessary expense in requiring a liquidator to distribute the company's share of the escrow sum.

62 On appeal, the appellant sought to adduce new evidence in relation to the company directors' disqualification, convictions and criminal charges, and the respondent company sought to adduce new affidavits that purportedly revealed the appellant's true motivation in seeking the winding-up order. These applications were rejected by the Court of Appeal on the basis of non-compliance with the *Ladd v Marshall* requirements. Even though the appeal technically related to a hearing of a winding-up application which did not involve the taking of evidence by oral hearing, it is clear that it arose in the context of several other ongoing and concluded legal disputes, for which considerable evidence had been adduced, both orally as well as affidavit evidence.

63 Thus, in view of the nature of the proceedings in question, the criterion of non-availability in *Ladd v Marshall* ought not to be applied strictly to Anan's application in the instant case. It is true that Anan could have and ought to have procured the Deloitte Report for the purposes of the hearing below, but the fact that it did not do so should not be fatal to the present application, particularly if the Deloitte Report is potentially relevant to the appeal. We note further that this

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was not a case where Anan had decided to withhold the argument on quantification of debt so as to spring it on appeal, but rather that it had decided to run its case based on arguments of frustration or *force majeure* but such arguments had failed before the High Court. There was no question of abuse of process (see above at [45]), and Anan's decision to mount the arguments in CWU 183 below (for which the Deloitte Report would not be relevant) was perhaps not unreasonable given the compressed timelines of the proceedings below. Our analysis might well have been different had the proceedings below been a protracted one in which parties had every chance to refine and revisit their cases and pleadings before the hearing, and having elected to proceed with one argument instead of another, Anan then sought to retrieve lost ground on appeal.

64 During the hearing before us, VTB argued that there was no conceivable universe in which the Deloitte Report would be relevant. On its case, the GMRA contemplated a contractual regime in which the non-defaulting party (here, VTB) had wide-ranging discretion to determine the valuation of the GDRs without having to undertake any ground-up valuation methodology such as those employed in the Deloitte Report. We did not find this argument persuasive. It was clear that Anan's argument was not that the GMRA obliged VTB to undertake any particular type of valuation, but rather that the valuation should be reasonable. After all, the material provision in the GMRA *ie*, cl 10(e)(iii),[11] states that the "net value" means:

> …the amount which, *in the reasonable opinion of the non-Defaulting Party*, represents their fair market value, having regard to such pricing sources (including trading prices) and methods (which may include, without limitation, available

[11] Reply affidavit of Stanislav at p 33.

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> prices for Securities with similar maturities, terms and credit characteristics as the relevant Equivalent Securities or Equivalent Margin Securities) as the non-Defaulting Party considers appropriate… [emphasis added]

Whilst this clause undoubtedly conferred VTB considerable discretion in its choice of the valuation method, it nonetheless required VTB's opinion of the net value of the GDRs to be "reasonable". We express no view as to whether the Deloitte Report and the opinions therein are ultimately relevant to the merits of the appeal in CA 174, but it is clear that it has potential relevance at least to the issue of the reasonableness of VTB's valuation of the GDRs which goes to the very root of the debt claimed by VTB.

65 Ultimately, we were persuaded by the considerations of proportionality in this case. If we were to reject Anan's application to adduce the Deloitte Report for CA 174, we cannot, at this stage, discount the possibility that Anan's substantive appeal might fail, given that Anan has abandoned its case on frustration and *force majeure*. This must be balanced against Anan's case on appeal which relies solely on the quantification of the debt as the factual basis to oppose the winding-up order. It seems to us that if the valuation of the GDRs in the Deloitte Report were to be adopted, it would follow that no debt would be owing to VTB. Further, if the quantum of the debt was considerably lower than the US$170m claimed by VTB in the statutory demand, it cannot be assumed that Anan would not be able to either top up the collateral or to pay off the reduced debt. In either situation, the winding-up petition would be denied.

66 It is clear that the winding-up of a company is a draconian and largely irreversible outcome. On the other hand, allowing the Deloitte Report to be adduced does not cause any prejudice to VTB which cannot be compensated by an appropriate costs order. During the hearing of this application, VTB argued

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that it would suffer prejudice in the "loss of commercial finality" – but this is a constant in every case where fresh evidence is allowed to be adduced and simply reflects the broader notion of *finis litium* being a desirable but not immutable objective.

Conclusion

67 For the foregoing reasons, we granted Anan's application to adduce the affidavit of Andrew Ooi Lih De exhibiting the Deloitte Report for the purposes of CA 174 and ordered the costs of this application to be costs in the appeal.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Quentin Loh Judge

Lee Eng Beng SC and Chew Xiang (Rajah & Tann Singapore LLP) for the appellant;
Philip Antony Jeyaretnam SC, Shobna d/o V Chandran, Lee Chia Ming, and Ashwin Nair Vijayakumar (Dentons Rodyk & Davidson LLP) for the respondent.

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