

A second bite at the cherry: Using fresh evidence on appeal
Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)
[2019] SGCA 41

I. Executive summary

When a case goes on appeal,¹ parties often try to adduce (or offer) new evidence as part of the appeal. Generally, where the new evidence concerns matters which occurred *before* the date of the decision in the court below, parties are allowed to offer such evidence only with leave (or permission) from the higher court.² This is in the interests of finality in litigation, and also of the fair administration of justice (so as to incentivize parties to advance their entire case at trial, rather than deliberately leave over points solely for the purpose of appeals and thereby obtaining a “second bite at the cherry”).

The Court of Appeal (“CA”) in *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] SGCA 41 further clarified how courts should in future consider requests to introduce such new evidence, by introducing a comprehensive and more nuanced two-step analysis.

First, the court should consider the nature of the proceedings below and determine the extent to which they bear the characteristics of a full trial.

- If the proceedings below do resemble a full trial, fresh evidence should generally *not* be allowed, in the interests of finality in litigation and the fair administration of justice. Subject to the second step (as discussed below), the courts should thus apply the *Ladd v Marshall* requirements with full rigour.
- Where the proceedings below do not resemble a full trial, the courts will remain guided by the *Ladd v Marshall* requirements, but do not have to apply it strictly.

Second, even where the proceedings below do bear the characteristics of a full trial, in the interests of justice the court should still take the additional step of determining whether there are any other reasons for such further evidence to be adduced.

The CA also stressed that the court is, in every instance, conducting a balancing exercise between: a) the interests of finality of proceedings and a successful respondent’s entitlement to rely on a judgment in his favour, and b) 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.

II. Material facts

Anan Group (Singapore) Pte Ltd (“Anan”) and state-owned Russian bank VTB Bank (Public Joint Stock Company) (“VTB”) entered into an agreement, whereby Anan would sell certain securities to VTB, and then repurchase them from VTB at a later date at pre-agreed rates. The pre-agreed rates amounted, in essence, to the original purchase price paid by VTB plus interest and other costs. The CA considered this arrangement in substance a loan from VTB to Anan.

Under this arrangement (and the agreement), Anan was obliged to maintain sufficient collateral, which would be determined based on a specified ratio. If the ratio fell below a certain

¹ This means that one of the parties is requesting that the decision made by a court be reviewed by a higher court.

² However, further evidence may be given on appeal, without leave of the court, regarding matters which occurred *after* the date of the decision in the court below.

level, VTB could exercise its contractual right to call on Anan to top up the amount of collateral. Anan then sold VTB the securities for approximately US\$250 million.

As a result of sanctions imposed by the United States Treasury's Office of Foreign Assets Control, the value of the underlying shares fell by more than half. VTB informed Anan that its collateral had fallen below the agreed value, and asked Anan (in accordance with the agreement) to restore the collateral by topping it up with a specified cash margin, but Anan failed to do so within the stipulated timeframe. VTB subsequently sent Anan a notice of default, including an early termination of the agreement. This meant that Anan was required to repurchase the securities at the original purchase price plus accrued interest; in other words, Anan had to repay the "loan" to VTB on the early termination date. VTB determined the outstanding debt owed by Anan to be approximately US\$170m (based on calculating the outstanding amount owned by Anan minus the total value of the securities held by VTB), based on a valuation of the securities at US\$2.50 each.

In July 2018, VTB served a statutory demand for the sum of approximately US\$170 million; Anan failed to repay this sum within the required period. Following Anan's failure to make payment, VTB applied to the High Court to wind up Anan. The High Court granted the application and ordered Anan to be wound up. Anan appealed: its arguments focused on the threshold to prove a debt governed by an arbitration agreement, and whether it was met in this case.

At issue here specifically is that Anan applied to adduce new evidence on appeal, being essentially a report prepared by Deloitte (the "**Deloitte Report**".) The Deloitte Report stated that the securities should have been valued at between US\$8.01 and US\$8.68 (as compared to VTB's US\$2.50 valuation). It also commented on the methodology adopted by VTB in arriving at its valuation of US\$2.50. If the valuation in the Deloitte Report were to be adopted, it would mean that the securities were worth much more than VTB claimed, and hence that no debt was due and owing from Anan to VTB at the material time. VTB opposed the application.

III. Discussion

The CA first decided on the applicable law for adducing new evidence on appeal, before applying it to the facts of this case.

A. Deciding the applicable law

The CA first set out the relevant legal background. Section 37 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) discusses the treatment of further evidence. Further evidence on matters occurring *after* the date of the decision of the lower court may be adduced on appeal without first requiring the appeal court's leave. However, for further evidence on matters which occurred *before* the date of decision of the lower court, such evidence may be adduced only on special grounds and with the appellate court's leave.

The criteria of "special grounds" have been interpreted by the courts to refer to the three-fold requirements in the English case of *Ladd v Marshall* [1954] 1 WLR 1489. They are:

- *Non-availability*: It must be shown that the evidence could not have been obtained without reasonable diligence for use at the trial or hearing below;
- *Relevance*: 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); and
- *Credibility*: The evidence must be such as is "presumably to be believed", i.e. it must be credible, though it need not be incontrovertible.

The underlying rationales were interests of finality in litigation and the fair administration of justice. Regarding the interests of finality in litigation: a final judgement that has been rendered in a litigant's favor should not be disturbed unless there are good reasons to do so. Regarding the fair administration of 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 leave over points for the purpose of appeals. However, while these rationales were desirable and fundamental principles of law, the CA observed that they were not unassailable objectives that would always be consistent with the ends of justice in every case.

The CA then provided two criteria for determining the applicability of the *Ladd v Marshall* requirements. *First*, the court should consider the nature of the proceedings below, and where they lie on a spectrum of cases. On one end of the spectrum are cases where the appeal is against a judgement after a trial or hearing having the full characteristics of a trial (i.e. which involves extensive taking of evidence and particularly oral evidence) – in such cases, the requirements in *Ladd v Marshall* should generally be applied in their full rigour. On the other end of the spectrum are cases where the hearing was not upon the merits at all, such as in the case of interlocutory appeals³ – in such cases, *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 do not bear the characteristics of a trial), the court should determine the extent to which the first *Ladd v Marshall* condition (of *non-availability*) should be applied. The CA considered this approach “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.”

Second, even where the proceedings bear the characteristics of a full trial, fresh evidence can still be admitted in exceptional cases where it would affront common sense or a sense of justice to refuse leave to adduce fresh evidence. This is because the *Ladd v Marshall* test should not be applied rigidly as if it were a statutory provision. Instead, the nature of the proceedings giving rise to the judgment appealed against is only one facet of the inquiry. The court retains its overarching discretion to act as the interests of justice require, which includes the discretion to admit new evidence despite an applicant's failure to satisfy the conditions of *Ladd v Marshall*. The CA provided three such categories of exceptional cases:

1. Where new evidence reveals fraud perpetrated on the court below

The CA would exercise discretion to admit new evidence, even where the first *Ladd v Marshall* requirement of non-availability had 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.” This is because 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.

It would clearly be in the interests of justice to admit fresh evidence where such evidence would reveal that one of the parties had perpetrated a fraud on the lower court, and to rectify the miscarriage of justice that would otherwise result in allowing a judgement tainted with fraud

³ An interlocutory appeal is an appeal against a ruling before the conclusion of an entire trial. An example would be an interim appeal against a child custody order as part of a divorce case, while the overarching divorce case is still ongoing.

to stand. The CA, however, noted that such fraud should strike at the very root of the litigation, in the sense that the fresh evidence would have to be crucial to, or determinative of, the final outcome to be ultimately reached by the court.

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

Non-compliance with the *Ladd v Marshall* requirement of non-availability would not preclude the admission of fresh evidence where such evidence, while available at the trial or hearing below, was not allowed to be adduced through no fault of the applicant. Thus, where the trial judge had denied a party a fair opportunity to put forth relevant facts, or made a decision on a substantive point that parties had not had the opportunity to address, the fact that the requirement of non-availability was not technically fulfilled should not be held against the applicant. Indeed, in such situations this first requirement is actually considered satisfied. In any event, where a judgment under appeal is 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.

3. 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

In certain types of cases, 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. The CA discussed four such categories:

- cases involving the welfare and custody of children;
- criminal and quasi-criminal proceedings where the livelihood, liberty or even life of the accused person is at stake;
- judicial review cases which involve wider public interests; and
- patent disputes which affect not only the specific parties but the market at large.

It further noted a common thread running through these four categories: that due to the *subject matter* in question, the stakes of the dispute were either particularly heightened for the individuals concerned, or where the wider public interest was involved. Nonetheless, the CA cautioned that these were not closed categories. Additionally, the mere fact that a case fell within one of these categories did not automatically justify a relaxation of the *Ladd v Marshall* rule.

B. *Analysis of the present case*

Applying the above principles to the facts here, the CA first considered the nature of the proceedings below. It found that even though winding-up hearings are hearings on the substantive merits of the case and go beyond dealing with interlocutory matters of procedure, the proceedings below nonetheless did not bear the characteristics of a full trial. This was because there was limited taking of evidence, with no oral evidence or cross-examination of witnesses. Furthermore, the timelines leading to the hearing were compressed, meaning that parties had limited time to refine their cases. Finally, the CA noted that there was some force to Anan's further argument that the winding-up order itself lacked finality, as the quantification of debt could be revisited at a later stage.

Thus, the CA held that in view of the nature of the proceedings below, the criterion of non-availability in *Ladd v Marshall* ought not to be applied strictly here. While Anan could have, and ought to have, procured the Deloitte Report for the hearing below, the fact that it did not do so did not render the present application fatal, particularly if the report was potentially relevant to the appeal. Indeed, if the valuation of the securities in the Deloitte Report were

adopted, it would follow that no debt would be owed to VTB. Alternatively, if the quantum of debt was considerably lower than the US\$170m claimed by VTB in the statutory demand, it could not be assumed that Anan would be unable to either top up the collateral or pay off the reduced debt. Either way, the winding-up petition would be denied.

Finally, the court compared the draconian and largely irreversible outcome of winding-up Anan should the Deloitte Report not be allowed, with the fact that no real prejudice would be suffered by VTB should the report be allowed. It thus ultimately granted Anan's application to adduce the Deloitte Report.

IV. Lessons Learnt

This case clarifies the Singapore courts' sometimes conflicting approach on the adducing of new evidence on appeal into a clear two-step framework: to first consider the nature of the proceedings below, and second, if necessary, to nonetheless exercise the court's overarching discretion to act as the interests of justice required.

The CA also made clear that it was conducting a balancing exercise between the interests of finality, and the right of an applicant to put forth relevant and credible evidence. Anan's success in adducing new evidence here was precisely because the CA considered not only the nature of the earlier proceeding (being one that lacked the characteristics of a full trial), but also the fact that the Deloitte Report could significantly impact the substantive appeal.

Finally, it is pertinent to note that this case does not stand for the proposition that parties may deliberately withhold evidence that is reasonably available at trial and only adduce it at appeal to get a "second bite at the cherry". Instead, parties should always strive to produce all relevant evidence at trial.

Written by: Silas Siew Wei Ying, 3rd-year JD student, Singapore Management University School of Law.
Edited by: Ong Ee Ing (Senior Lecturer), Singapore Management University School of Law.