EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0013

BETWEEN:

HONOURABLE GUY JOSEPH
(In his personal capacity and in his capacity as Parliamentary Representative for Castries South East)

Appellant

and

[1] THE CONSTITUENCY BOUNDARIES COMMISSION
[2] THE HONOURABLE PRIME MINISTER
[3] THE ATORNEY GENERAL (acting in her capacity as the legal representative of Her Excellency, the Governor General)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Garth Patterson, QC with him Ms. Tami Pilgrim and
Mr. Thomas Theobalds for the Appellant
Mr. Anthony Astaphan, SC with him Mr. Jahn Siflett for the First Respondent
Mr. Sydney Bennett, QC with him Mr. Leslie Mondesir for the Second Respondent
Mr. Roger Forde, QC with him Mr. Dwight Lay for the Third Respondent

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2015: June 23, 24;
Written reasons delivered 1st October 2015.

Civil appeal – Fresh evidence application – Whether appellant satisfied the requirements for the admittance of fresh evidence

The appellant brought an administrative claim against the respondents alleging that the Constituency Boundaries Commission ("the Commission") had contravened certain provisions of the Constitution of Saint Lucia. The Commission engaged the services of Mr. Anthony Astaphan, SC as its legal representative. The appellant filed an application for an order restraining the Commission from retaining the services of Mr. Astaphan, SC to

represent it in the proceedings on the claim ("the Removal Application"). He alleged inter alia that Mr. Astaphan, SC's close and notorious relationship with the Prime Minister, the Chairman of the Commission, as well as his political alignment with the Saint Lucia Labour party will lead a fair minded and informed observer to conclude that there was a real possibility that Mr. Astaphan, SC would not bring to the discharge of his duties an unbiased mind and so would likely infect the Commission with his prejudices and predilections.

This application was dismissed by the learned trial judge and the appellant appealed. The appellant also filed an application to adduce fresh evidence on appeal. This fresh evidence was referred to as the "Google Material" (having been substantially derived from searches on the internet using Google) and was said to comprise newspaper articles and video footage of Mr. Astaphan, SC's alleged high political profile and partisan activism (including active campaigning) for political parties and their leaders including the Prime Minister and the Saint Lucia Labour Party.

Held: dismissing the application; and awarding costs to the Commission to be assessed unless agreed within 21 days, that:

1. In relation to interlocutory applications on appeal, where there had not been a full hearing on the merits, a court has a general discretion to admit fresh evidence. On these applications, a court adopts a more relaxed approach as it seeks to give effect to the overriding objective. An important factor to be taken into account by the court in exercising its discretion is the reason why the evidence was not adduced in the court below as parties have a clear duty to use such diligence as is reasonable to put before the first instance judge all the evidence on which he seeks to rely.

   Ladd v Marshall [1954] 1 WLR 1489 applied; **Thune and Another v London Properties Ltd. and Others** [1990] 1 WLR 562 applied; **Langdale and Another v Danby** [1982] 1 WLR 1123 applied; **Star News Shops Ltd. v Stafford Refrigeration Ltd** [1998] 1 WLR 536 applied; **Dennis Pritchard Evans v Tiger Investments Limited et al** [2002] EWCA Civ 161 applied; **Hertfordshire Investments Ltd v Bubb** [2000] 1 WLR 2318 applied.

2. In giving effect to the overriding objective this is not an appropriate case where the interest of justice requires the admission of the Google Material at this stage. There was a full hearing on the merits. The court must be astute to ensure that a party is not placed in a disadvantageous position where that party is then deprived of the opportunity to address the new evidence now being put forward. This is as fundamental a consideration of natural justice as any. This Google Material, were it permitted, would have deprived the Commission of any opportunity to counter it unless the entire Removal Application was remitted for a rehearing or otherwise to treat this Court as though it was one of first instance by allowing the Commission an opportunity to put forward rebuttal evidence. This approach would on the particular circumstances of this case be improper.

Dennis Pritchard Evans v Tiger Investments Limited et al [2002] EWCA Civ 161 applied; **Hertfordshire Investments Ltd v Bubb** [2000] 1 WLR 2318 applied.

3. It is indisputable that the Google Material could have been easily obtained for use at the hearing of the Removal Application. Notwithstanding, this information was not placed before the learned judge and no satisfactory explanation has been put forward as to why there was a failure to do so. Further, this information would have had no influence on the result of the underlying case, that is the administrative claim. The onus was on the appellant to place all the material which was available to him and on which he wished to rely for the purpose of establishing the allegations he made. A party's miscalculation of his risks does not provide strong grounds for admitting further evidence on appeal. Accordingly, no proper basis has been advanced as to why the interest of justice would be best served by admitting the Google Material on the appeal.

Ladd v Marshall [1954] 1 WLR 1489 applied; **Dennis Pritchard Evans v Tiger Investments Limited et al** [2002] EWCA Civ 161 applied.

REASONS FOR DECISION

[1] **PEREIRA CJ**: On 23rd June, the Court heard an application to adduce further evidence in relation to an appeal set for hearing on the same day. The appeal was brought against the dismissal by the judge below of an application made by the appellant seeking to restrain the first respondent ("the Commission") from engaging or continuing to engage senior counsel, Mr. Astaphan as its legal representative in the substantive proceedings below. The further evidence sought to be adduced comprised of material collected and downloaded from various web sites through the use of a Google search ("the Google Material"). The Google Material is sought to be introduced at this stage with a view to establishing, as the appellant contends, that Mr. Astaphan, SC is a notorious political activist and more specifically on behalf of the Saint Lucia Labour Party which party currently forms the Government of Saint Lucia. The court, on the morning following the hearing of the application, dismissed it with costs to be assessed unless agreed within twenty one days and undertook to provide written reasons for its decision at a later date. The court also further directed given the indication from counsel for the Commission that any costs orders in the nature of wasted costs or otherwise being

sought must be on written submissions to be filed and served within thirty days. We now provide our reasons, as promised, for dismissing the application.

The background

[2] A chronological background summary is useful in placing the application for adducing further evidence ("the Further Evidence Application") into context. The substantive claim in the court below is an administrative claim brought by the appellant in which he claims that the provisions of the **Constitution of Saint Lucia**[1] namely sections 57 and/or 58 are being contravened by the Commission in relation to its review of the number and boundaries of the constituencies into which Saint Lucia is divided and the purported preparation and submission by the Commission of a report dated December 2014 ("the Report") to the Governor General. Consequently, the appellant seeks declaratory, injunctive and other relief against the respondents. A chronology of events follows:

(a) 10th February 2015 – a draft order of the Governor General for giving effect to the recommendations of the Commission is laid before the House and receives the approval of a majority of the members of the House;

(b) 17th February 2015 – the appellant obtained ex parte (before Belle J) an order restraining the proclamation by the Governor General from giving effect to the recommendations contained in the Report was returnable on 27th February 2015;

(c) 20th February 2015 – Mr. Astaphan, SC enters the picture by way of an email sent to the Registrar of the court (copied to the appellant's counsel) in which he stated that he had been asked by the Hon. Attorney General to assist the Hon. Prime Minister and Her Excellency the Governor General in relation to the ex-parte application and order;

(d) Between 20th and 27th February 2015 – email correspondence flows between Mr. Astaphan, SC and counsel for the appellant with a view to

[1] Cap. 1.01, Revised Laws of Saint Lucia 2001.

agreeing a time table for expediting an early hearing of the substantive claim;

(e) 27th February 2015 – a consent order was entered (before Belle J) seeking to place the claim on track for an expedited hearing;

(f) 6th March 2015 – application made by the appellant for an order restraining the Commission from retaining the services of Mr. Astaphan, SC to represent it in the proceedings on the claim ("the Removal Application"), based on two main grounds namely:

(i) conflict in acting – Mr. Astaphan, SC having already been on record as representing the Hon. Prime Minister, and Her Excellency the Governor General; and

(ii) apparent bias – Mr. Astaphan, SC's close and notorious relationship with the Prime Minister, the Chairman of the Commission, as well as his political alignment with the Saint Lucia Labour Party which will lead a fair minded and informed observer to conclude that there was a real possibility that Mr. Astaphan, SC would not bring to the discharge of his duties an unbiased mind and so would likely infect the Commission with his prejudices and predilections.

(g) 22nd April 2015 – the Removal Application comes on for hearing inter partes (before Ramdhani J [Ag.]);

(h) 8th May 2015 – the Removal Application is dismissed;

(i) 20th May 2015 – notice of appeal against the dismissal of the Removal Application filed;

(j) 27th May 2015 – written reasons for dismissal of Removal Application given;

(k) 8th June 2015 – application to adduce further evidence filed.

The Further Evidence Application

[3] The Further Evidence Application is mainly concerned with the second basis for the Removal Application as set out above. The learned judge in his written reasons for rejecting the Removal Application, after analyzing the various newspaper articles placed in evidence before him[2] opined at paragraph 126 as follows:

> "Having regard to all of the above, … I am further unable to conclude from the statement that there is a 'long standing relationship between the Mr. Astaphan and the Prime Minister and the Chairman' the other evidence led on this issue including the newspapers reports exhibited that Mr. Astaphan is a political activist."

[4] The appellant says that this Court has a general discretion to admit further evidence in an interlocutory appeal and will do so where the evidence is necessary to the just determination of the appeal. That the further evidence is directly relevant to the fact that Mr. Astaphan, SC is in fact a political activist in Saint Lucia and in the OECS region – a fact that the learned judge failed to take judicial notice of, it being contended that this fact is an open and notorious fact. The further evidence sought to be adduced, referred to as the Google Material (having been substantially derived from searches on the internet) was said to comprise newspaper articles, and video footage from across the OECS region including Saint Lucia shows, says the appellant, Mr. Astaphan, SC's high political profile and partisan activism (including active campaigning) for political parties and their leaders, with whom he is aligned, including the Prime Minister and the Saint Lucia Labour Party.

The applicable principles

[5] **The Civil Procedure Rules 2000** ("CPR") do not contain a specific rule governing admission of fresh evidence on appeal unlike a provision contained in the Supreme Court Act in relation to criminal matters. In relation to civil matters

[2] At paras. 122 – 125.

however, the principles by which an appellate court is guided in admitting further evidence in relation to a matter on which there has been a trial on the merits are so well established by case law as to be considered trite. The authoritative statement of the principles is as laid down by Denning LJ in **Ladd v Marshall**[3] where he said:

> "To justify the reception of fresh evidence … three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; 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."[4]

[6] It is common ground that the test as set out in **Ladd v Marshall** applies in all its rigour when fresh evidence is sought to be introduced on appeal following a trial or full hearing on the merits. Other judicial authorities of more recent vintage suggest however, that in relation to interlocutory applications on appeal, the strict principles set out in **Ladd v Marshall** are relaxed as the court seeks to give effect to the overriding objective in circumstances where the issues between the parties are yet to be fully determined on their merits.

[7] In **Thune and Another v London Properties Ltd. and Others**[5] Lord Bingham stated, in effect, that where there had not been a full hearing on the merits **Ladd v Marshall** need not be directly applied in its full rigour. He then went on to make this statement:

> "There is nonetheless **a clear duty on parties to present their full case at first instance and it is very undesirable if interlocutory disputes are argued out afresh on different materials never put before the judge whose primary discretion it is**." (Emphasis added).[6]

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[3] [1954] 1 WLR 1489.
[4] At p. 1491.
[5] [1990] 1 WLR 562.
[6] At p. 571.

[8] Lord Bridge of Harwich in **Langdale and Another v Danby**,[7] after referring to the classic statement as expressed by Lord Denning in **Ladd v Marshall** as to what amounts to special grounds for admitting fresh evidence went on to say this:

> "In the situation arising on an appeal to the Court of Appeal from a summary judgment, the application of these conditions and perhaps the conditions themselves will require some modification. It may well be that the standard of diligence required of a defendant preparing his case in opposition to a summons for summary judgment, especially if under pressure of time, will not be so high as that required in preparing for trial…
>
> But I can see no injustice at all in requiring a defendant to use such diligence as is reasonable in the circumstances to put before the judge on the hearing of the summons, albeit in summary form, all the evidence he relies on in defence, whereas it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but was not produced."[8]

[9] In **Star News Shops Ltd. v Stafford Refrigeration Ltd**,[9] it was accepted by the court the strict rules of **Ladd v Marshall** did not apply as the matter was an interlocutory matter and there had not been a trial or hearing on the merits. Consequently, it was held that the court had a general discretion to admit fresh evidence under what was then Rules of the Supreme Court, Order 59, rule 10(2). Otton LJ went on to opine that "an important factor to be taken into account in exercising that discretion is the reason why the evidence was not adduced in the court below".[10]

[10] In **Dennis Pritchard Evans v Tiger Investments Limited et al**,[11] Porter LJ, in relation to the introduction of fresh evidence on appeal had this to say at paragraph 23:

> "It has not been in dispute before us that, in deciding whether or not to entertain upon an appeal evidence which was not before the lower court under the provisions of CPR 52.11(2) the principles embodied in cases such as **Ladd v Marshall …** still fall to be broadly applied, save that, in an

[7] [1982] 1 WLR 1123.
[8] At p. 1133.
[9] [1998] 1 WLR 536.
[10] At p. 541.
[11] [2002] EWCA Civ 161.

appropriate case, relaxation may be called for in the light of the overriding objective: see for instance Banks v Cox (Unreported) 17 July 2000 … per Morritt LJ and Hertfordshire Investments Ltd. v Bubb [2000] 1 WLR per Hale LJ…"

[11] Hale LJ put it this way in **Hertfordshire Investments Ltd v Bubb**[12] in referring to the power given under the English rules, CPR 52.11(2):

> "The court will not consider evidence which was not before the court below unless it has given permission for it to be used. It is no longer necessary to show "special grounds". The discretion must also be exercised in accordance with the overriding objective of doing justice. However, in Banks v. Cox (unreported) 17 July 2000; Court of Appeal (Civil Division) Transcript No. 1476 of 2000, Morritt L.J. said:
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> > 'In my view the principles reflected in the rules in Ladd v. Marshall … remain relevant to any application for permission to rely on further evidence, not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below'."[13]

Hale LJ then continued:

> "It follows from all of this that it cannot be a simple balancing exercise as the judge in this case seemed to think. **He had to approach it on the basis that strong grounds were required.** The Ladd v. Marshall criteria are principles rather than rules but, nevertheless, they should be looked at with considerable care and in this particular case, of course, the first of those principles was not fulfilled: the evidence could clearly have been available readily at trial."[14] (Emphasis added).

The nature of the Removal Application

[12] This leads to a discussion as to the nature and purport of the Removal Application. It is not suggested nor could it be, that the Removal Application has any bearing or impact whatsoever on the substantive claim. It stands or falls on its own weight. It has been mounted as a proceeding within the substantive claim but does not and could not affect the claim whichever way the Removal Application was decided. It was brought by the appellant who alleged the inappropriateness of Mr. Astaphan, SC acting on behalf of the Commission for the reasons which they gave and he

[12] [2000] 1 WLR 2318.
[13] At p. 2325.
[14] At p. 2325.

put forward the evidence which he considered supported and would enable to learned judge to so conclude. The Removal Application was hotly contested. Both sides placed evidence before the court and a full hearing on the merits, complete with submissions, was afforded by the learned judge. The learned judge was not satisfied on the evidence adduced by the appellant that the appellant had made out a case for the removal of Mr. Astaphan, SC and dismissed the Removal Application. The substantive claim remains completely unaffected. Had the learned judge acceded to the Removal Application, the substantive claim would similarly remain completely unaffected. Accordingly, in the context of this case the question as to whether order resulting from the determination of the Removal Application may be said to final or interlocutory is of no moment.

Discussion – the exercise of the discretion

[13] The position in this case is miles away from the manner in which the principles were discussed in **Star News** decision or even the summary judgment considerations which were being addressed in the **Evans** decision. Here, the appellant did not seek to suggest nor could he (in our view rightly,) that he did not have or had limited time to put his full case or to deploy all the evidence which he wished to adduce to prove his assertions before the learned judge. There was ample opportunity to do so. After all it is readily suggested that the Google Material sought to be introduced was readily and easily available by a Google search on the internet and was certainly available at the time the appellant made his Removal Application. Rather, what he says in a nutshell, is that the learned judge, not having been satisfied by the evidence put forward, he now wishes to bolster his case by now putting forward on appeal this additional material. Accordingly, we were simply not satisfied that this case, although couched as an interlocutory application, is one which warrants a relaxation of the principles in **Ladd v Marshall**. It would most certainly fail on the first two conditions of the test set out therein. As to the first, it is indisputable that the Google Material could have been easily obtained for use at the hearing of the Removal Application. As to the second, it would certainly have no influence on the result of the underlying case. Further, it is very doubtful that the Google Material would have influenced

the result of the Removal Application which specifically relates to Mr. Astaphan, SC's suitability to be legal counsel in Saint Lucia to the Commission as a defendant in the substantive claim.

[14] That said, adopting the more relaxed approach, in giving effect to the overriding objective as advocated in **Evans** case, and having regard to the observations made by Hale LJ in **Hertfordshire**, we are far from satisfied that this is an appropriate case where the interest of justice requires the admission of the Google Material at this stage. The court must be astute to ensure that a party is not placed in a disadvantageous position where that party is then deprived of the opportunity to address the new evidence now being put forward. This is as fundamental a consideration of natural justice as any. As stated earlier, the Removal Application is a stand-alone application. It takes the substantive case no further either way. As such, this new Google Material, were it permitted, would have deprived the Commission of any opportunity to counter it unless the entire Removal Application was remitted for a rehearing or otherwise to treat this Court as though it was one of first instance by allowing the Commission an opportunity to put forward rebuttal evidence. This approach would, on any view, be most undesirable and on the particular circumstances of this case, improper. The Removal Application has already been fully ventilated on its merits before the learned judge where the appellant had a full opportunity to deploy all the evidence that he wished to place before the learned judge in support of his application. This Google Material was readily available on the making and hearing of the Removal Application. It was in every respect the appellant's case to make and thus his duty to deploy all the material which he considered necessary to prove his assertions and not leave it to chance. As Lord Bingham said in **Thune**, and which we adopt, "it is very undesirable if interlocutory disputes are argued out afresh on different materials never put before the judge whose primary discretion it is".

[15] No satisfactory explanation has been put forward as to why the Google Material was not placed before the learned judge in support of the Removal Application save to suggest that the Google Material is evidence in respect of which the

learned judge should have taken judicial notice. In essence, the appellant says that the learned judge ought to have carried out a Google search which would have apprised him of these facts which the appellant says are notorious as it relates to the allegations made in respect of Mr. Astaphan, SC in the Removal Application. We are of the considered view that were these facts notorious as contended it would hardly necessitate a judge having to conduct a Google search to discover them. They would be so well known as to be universally accepted. Furthermore, to require a judge to engage in such a course is most improper to say the least and quite dangerous. Such an approach ought not to be encouraged. It forms no part of a judge's role. We can say it no better than by adopting the words of Callinan J in **Woods v Multi-Sport Holdings Pty Limited**[15] which are quite apt to the circumstances of this case:

> "… judges are not free to apply their own views and to make their own inquiries of social ethics, psychology, politics and history without requiring evidence or other proof. Two reasons why this is so are immediately apparent. The first is that parties must be given an opportunity to deal with all matters which the court regards as material. The second reason is that rarely is there any universal acceptance of what are true history, politics and social ethics. Anyone with any knowledge of these will be aware that there is a huge, indeed probably immeasurable, range of differences as to what they legitimately are, and the ways in which they are to be identified understood and applied." [16]

Here, there appears to be a difference of opinion even as to what the term 'political activist' truly means or in any event doubt as to its meaning ascribed thereto by the learned judge. That in and of itself exemplifies the undesirability of a judge engaging in such an inquiry.

[16] The onus was on the appellant to place all the material which was available to him and on which he wished to rely for the purpose of establishing the allegations he made. If he chooses not to do so then that is the risk he took and must be taken to accept and abide the consequences of the choice made by him and not seek to rectify it in hindsight after the decision has gone against him. To do otherwise

[15] [2002] 208 Commwealth Law Reports 460.
[16] At p. 511, para. 165.

would give the concept of having regard to the overriding objective in dealing with cases justly a hollow ring. As Porter LJ said in **Evans** "Tiger took a calculated risk to proceed with trial without objection or application to adjourn".[17] Here, substituting the appellant for Tiger, the position was far worse as here, the allegations were those of the appellant's in the first place, and thus he ought to have adduced all his evidence to support them. A party's miscalculation of his risks clearly, does not provide strong grounds for admitting further evidence on appeal and accordingly no proper basis has been advanced as to why the interest of justice would be best served by admitting the Google Material on the appeal.

[17] For the foregoing reasons the Further Evidence Application was dismissed.

Costs

[18] The Commission shall have its costs of this application to be assessed unless agreed within 21 days. By way of completeness, no costs orders are hereby made in favour of the other respondents who, although named on the appeal and who were heard on this application, are not affected thereby, no relief having been sought as against them. The court nonetheless expresses its gratitude for the assistance rendered by them and by counsel on all sides in the submissions put forward on the application. As earlier directed, any additional costs orders which the court may be invited to make shall be determined at a later date on written submissions made by the parties.

Dame Janice M. Pereira, DBE
Chief Justice

Davidson Kelvin Baptiste
Justsice of Appeal

Gertel Thom
Justice of Appeal

[17] At para. 4.