

**IN THE COURT OF APPEAL**  
**APPELLATE JURISDICTION**

**CIVIL APPEAL NO. ABU 90 of 2010**  
**(High Court Civil Action No. HBC 611 of 2005)**

**BETWEEN** : **WESTERN MARINE LIMITED** *Appellant*

**AND** : **1. KELERA LEDUA LEVAKARUA**  
**2. SOUTH SEAS ENGINEERING LIMITED**  
*Respondents*

**Coram** : **Calanchini AP**  
**Chandra JA**  
**Amaratunga JA**

**Counsel** : **Mr S P Sharma and Mr K Naidu for Appellant**  
**Mr N Barnes and M J Cati for Respondents**

**Date of Hearing** : **16 May 2013**

**Date of Judgment** : **30 May 2013**

**JUDGMENT**

**Calanchini AP**

[1] I agree with the reasons and the conclusions of Chandra JA.

**Chandra JA**

[2] The Appellant has made an application to adduce further evidence pursuant to Rule 22 of the Court of Appeal Rules and this judgment is in respect of that application.

- [3] The 1<sup>st</sup> Respondent as Administratrix of the Estate of Taniela Vuli filed a writ of summons together with a statement of claim, claiming that the Appellant and the Second Respondent were liable for the injuries suffered by Taniela Vuli who died as a result of being electrocuted by touching a welding machine belonging to the 2<sup>nd</sup> Respondent which had been given for the use of the Appellant and returned to the 2<sup>nd</sup> Respondent.
- [4] The trial had proceeded inter partes on the basis of representation by both parties, the Appellant and the 2<sup>nd</sup> Respondent by the same solicitors and judgment had been entered against the Appellant and the 2<sup>nd</sup> Respondent on the basis of their liability being apportioned as 10% on the deceased, 75% (of 90%) on the Appellant and 25% (of 90%) on the 2<sup>nd</sup> Respondent.
- [5] The 2<sup>nd</sup> Respondent had paid their share of the responsibility and obtained a discharge from the 1<sup>st</sup> Respondent.
- [6] The Appellant had filed an appeal within time through a firm of Solicitors and thereafter applied for a stay of execution on 27<sup>th</sup> February 2008. In the affidavit of Minghua Liu of the Appellant Company, he had set out assertions regarding his Company not being served with Writ of Summons and not appointing Mr. Gavin O'Driscoll to act on their behalf, regarding which the evidence is sought to be adduced in the application for leading fresh evidence.
- [7] The Appeal was set for hearing on 16 March 2011 and after hearing the appeal, the judgment was reserved.

[8] The Appeal was set for re-hearing as the judgment was not given by the panel of Judges who heard the appeal. The Appellant after a change of solicitors has filed the application for hearing of fresh evidence and an amended notice of appeal and grounds of appeal. In the said amended grounds of appeal Ground 9 is the one that relates to the present application which is for consideration before this Court.

Ground 9 states as follows:

*“Subject to leave being granted to adduce further evidence, that there has been a substantial wrong or miscarriage of justice to the Appellant in all the circumstances pertaining to trial of the proceedings in the High Court and accordingly the Judgment dated 23<sup>rd</sup> January 2008 be set aside and/or new trial be ordered.”*

*“Particulars:*

- i. The Appellant was never served with the Writ of Summons (with Statement of Claim attached) in the High Court;*
- ii. That the Appellant had no knowledge of the existence of the proceedings and of it being in the High Court from its institution on 28<sup>th</sup> December 2005 until after the judgment herein was delivered on 23<sup>rd</sup> January 2008;*
- iii. The Appellant had never given any instructions or retained legal counsel Mr.Gavin O’Driscoll in respect of this or any other matter including in particular to make any legal representations on its behalf or agree to 75% apportionment of liability;*
- iv. The appellant was denied natural justice an opportunity to defend the claims made against it in these proceedings or be heard;*
- v. The Appellant also refers to and relies on the grounds set out in the Affidavit of Mr. Minghua Liu sworn and filed herein.”*

[9] On the filing of the application for fresh evidence the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent also filed affidavits in response to the affidavit filed on behalf of the

Appellant Minghua Liu as well as by the Solicitor who had appeared on behalf of the Appellant at the trial and further affidavits in reply which are set out in chronological order as follows:

- 4<sup>th</sup> February 2013 Affidavit of Minghua Liu in support of Appellant's application for leave to adduce fresh and/or further evidence (including letter sent to Messrs. O'Driscoll & Co. Solicitors).
- 13<sup>th</sup> March 2013 Affidavit in reply of Emosi Lesivakarua for 1<sup>st</sup> Respondent.
- 18<sup>th</sup> March 2013 Affidavit in answer of Gavin Adam Louise O'Driscoll, Legal Practitioner including respondents with QBE Insurance (Fiji) Limited and letter from Diven Prasad Lawyers dated 19<sup>th</sup> February 2008 and its reply thereto.
- 18<sup>th</sup> March 2013 Affidavit of Mesake Waqa, Litigation Clerk of Munro Leys, Solicitors for 2<sup>nd</sup> Respondent including affidavit of John Liburne Hunt, General Manager QBE Insurance.
- 18<sup>th</sup> March 2013 Affidavit of Kamlesh Narayan in response to affidavit of Minghua Liu (Claims Supervisor QBE Insurance (Fiji) Ltd).
- 25<sup>th</sup> March 2013 Affidavit of John Liburne Hunt in response to affidavit of Minghua Liu including correspondence with O'Driscoll & Co. and 1<sup>st</sup> Respondent.
- 28<sup>th</sup> March 2013 Affidavit of Josevata Cati in support of application for leave to re-file signed affidavit and to file and serve answering affidavit of John Hunt.
- 28<sup>th</sup> March 2013 Summons to re-file signed affidavit and file answering affidavit of John Hunt.

2 <sup>nd</sup> April 2013	Affidavit of Minghua Liu in response to affidavit of Kamlesh Narayan.
2 <sup>nd</sup> April 2013	Affidavit of Minghua Liu in response to affidavit of John Liburne Hunt.
2 <sup>nd</sup> April 2013	Affidavit of Minghua Liu in response to affidavit of Gavin Adam Louise O’Driscoll including correspondence between Patel Sharma Lawyers and Messrs. O’Driscoll & Co.
2 <sup>nd</sup> April 2013	Affidavit of Minghua Liu in response to affidavit of Emosi Lesivakarua.
5 <sup>th</sup> April 2013	Affidavit of John Liburne Hunt in answer to affidavit of Gavin O’Driscoll.
5 <sup>th</sup> April 2013	Affidavit of John Liburne Hunt in response to affidavit of Minghua Liu including correspondence with O’Driscoll & Co.
15 <sup>th</sup> April 2013	Affidavit of Minghua Liu in response to affidavit of John Liburne Hunt.
16 <sup>th</sup> April 2013	Affidavit in reply to the affidavit of John Liburne Hunt by Taraivina Ranadi Biu, Clerk of Law Firm of Vuataki Law authorised by 1 <sup>st</sup> Respondent.

[10] Rule 22(2) of the Court of Appeal provides:

*“The Court of Appeal shall have full discretionary power to receive further evidence upon question of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner;*

*Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after*

*the date of the trial or hearing ) shall be admitted except on special grounds.”*

[11] The granting of such an application has been recognized in several decisions in Fiji. In **ANZ Banking Group Ltd v Merchant Bank** [1994] FJCA 51 it was stated that the provisions in Rule 22(2) were substantially the same as in England. In **Ladd v Marshall** [1954] 3 All ER the conditions that have to be satisfied to lead fresh evidence were stated as follows:

*“(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.*

*(2) 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.*

*(3) 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.”*

[12] These tests were applied in **Chand v Chand** [2012] FJCA 22 by the Court of Appeal. However, it has been expressed that allowing of fresh evidence should not be based on an invariable rule as was expressed in **Sachinda Nand Mudaliar** [2008] FJSC 25; CAV0001.2007 (17 October 2008) by the Supreme Court that “no invariable rule concerning the failure to call such evidence can or should be laid down. The discretion conferred upon the Court must be exercised judicially, but having due regard to the interests of justice, above all else.”

[13] A consideration of the Supreme Court Practice 1991 paragraph 59/10/7 (p.944) in relation to Appeals to the Court of Appeal would be significant in the present case.

*“59/10/7 – Applications for leave to adduce further evidence. Where there has been a “trial or hearing on the merits” (see para.59/10/8), fresh evidence cannot be admitted before the Court of Appeal unless “special circumstances” have been established (r.10(2), or “the evidence*

*relates to matters which have occurred after the date of the trial or hearing” (ibid). To establish “special circumstances” the applicant must satisfy the three conditions laid down in **Ladd v Marshall** (1954) 1 W.L.R. 1489’ [1954] 3 All ER 745, C.A., (para.59/10/9).*

*Where the evidence “relates to matters which have occurred after the date of the trial or hearing,” the Ladd v Marshall conditions do not apply and the Court has a discretion in deciding whether to grant leave to adduce the further evidence. (See para.59/10/10). But, the words “the evidence relates to matters which have occurred after the date of the trial or hearing” do not cover evidence **coming to light after trial** of matters which **occurred before trial**. Where the applicant discovers after trial evidence of matters which occurred before trial such evidence of matters which occurred before trial cannot be adduced before the Court of Appeal unless the **Ladd v Marshall** conditions are satisfied.*

*Where there has been no “trial or hearing” on the merits, the **Ladd v Marshall** conditions do not apply and again the question whether leave to adduce the further evidence should be granted is a matter within the discretion of the Court (see para.59/10/11).*

*Order 59/10/11 – **Where there has not been a trial or hearing on the merits** – In such cases the Ladd v Marshall conditions do not apply and the Court of Appeal has a general discretion whether to admit fresh evidence. But, an important factor taken into account in exercising that discretion is the reason why the evidence was not adduced in the court below.”*

[14] The cases that have applied the rules in **Ladd v Marshall** have been cases where the trials have been concluded inter partes and where there has been no complaint made regarding the presence of the parties at the hearing. The present case is of a different nature, in that the complaint of the Appellant is that they did not participate at the hearing although the hearing has proceeded as seen from the record inter partes. That has been due to the fact that the firm of O’Driscoll and Co. has represented both the Appellant as well as the 2<sup>nd</sup> Respondent and the matter has proceeded inter partes.

[15] The complaint of the Appellant is that he never received the Writ of Summons and therefore was not aware of the proceedings and came to know that there was a case against

the Company only when the copy of the judgment dated 23<sup>rd</sup> January 2008 was received. The Appellant had thereafter taken steps to file the appeal. Although in the notice of appeal filed in the first instance on 22<sup>nd</sup> February 2008, the ground relating to the Appellants' not receiving the writ of summons was not directly stated, some of the grounds alluded to the fact that the Court had not heard evidence from any representative of the Appellant and that the Defence Counsel had no instructions to such apportionment of the liability on behalf of the Appellant. However, in the application seeking stay of execution of the judgment, the affidavit filed on behalf of the Appellant on 27<sup>th</sup> February 2008 specifically set out the position that the Appellant had not been served with Writ of Summons and that they had not appointed Mr. Gavin O'Driscoll to act on their behalf in the said action and that they came to know that Mr. O'Driscoll had acted on their behalf only when the copy of the judgment was received. The application for stay of execution had been granted on the strength of the affidavit filed on behalf of the Appellant Company.

[16] The present case therefore presents a picture different from situations where the **Ladd v Marshall** principles would apply and would attract the application of Rule 22 and paragraph 59/10/11 where the Court of Appeal has a general discretion whether to admit fresh evidence, and the important factor to be taken into account in exercising that discretion is the reason as to why such evidence was not adduced in the court below.

[17] In the application of the Appellant to lead fresh evidence, the Appellant is seeking to lead evidence regarding the fact that they had not received the writ of summons, that they had not been aware of the proceedings, that they had not instructed any lawyer to represent them as set out in paragraphs 1 to 7 and to place evidence regarding the merits of the case as set out in paragraph 8 to 15 of the affidavit of Minghua Liu filed on 4<sup>th</sup> February 2013. These matters will have to be considered by the Court by taking into account the affidavits filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and by Mr. O'Driscoll as well.



[18] Such evidence would come within the purview of the provision in Rule 22 and paragraph 59/10/11 as it is clear that such evidence could not be led in the court below as the Appellant was not aware of such proceedings according to what is stated in the affidavit of Minghua Liu.

[19] In the New Zealand case of Young Kwan Kim v Jung Nam Lee (CA 107/2012) NZCA 248 a somewhat similar situation had arisen where a solicitor had not appeared and the Appellant had not been represented at the trial and where the judgment had been entered upon formal proof. The Court granted the Appellant leave to adduce evidence as otherwise the appeal would be pointless since he would be in the same position as he was at the trial before the original court.

[20] The evidence that is proposed to be led by the Appellant is on two facets as stated above, one in relation to the Appellant not receiving originating summons and the other in relation to the merits of the case. As far as the evidence in relation to the merits of the case, such evidence would be fresh as that evidence could not be given as the Appellant did not know that the trial was taking place.

[21] The submissions made on behalf of the 1<sup>st</sup> Respondent opposing the application of the Appellant was on the basis that the writ of summons had been served on the Appellant and that the application does not meet with the requirements in Ladd v Marshall. In view of the position taken up by the Appellant that the writ of summons was not served on them and the record of the High Court not showing the position of the service of summons, it would be in the best interests of justice to consider the evidence set out in the affidavit of the Appellant together with the affidavits filed by the Respondents regarding service of summons, specially the affidavit of Emosi Lesivakarua. As stated above, the rules in Ladd v Marshall would not apply in a case of this nature. In any event the first Respondent has

already had the satisfaction of receiving the payment made by the second respondent in terms of the judgment.

[22] The submissions of the 2<sup>nd</sup> Respondent opposing the application of the Appellant are firstly on the basis of the rules laid down in **Ladd v Marshall**, secondly the injustice that would be worked upon the 2<sup>nd</sup> Respondent, and thirdly that the Appellant has other remedies for its complaint.

[23] As to the requirement in **Ladd v Marshall** that the evidence should be fresh, the submission is that the evidence is not fresh and that the Appellant was aware of the unusual circumstances surrounding the case since at least February 2008 and that no explanation has been provided for the delay in making the application. There has been a delay in making the application for fresh evidence as the application was made only in February 2013 but the fact remains that the basis of the application was set out by the Appellant in February 2008 when applying for the stay of execution of the judgment. The affidavits filed by the second respondent and Mr. O'Driscoll show that the Appellant gave no instructions to Mr. O'Driscoll and Company as the said Lawyers were specifically instructed to appear on behalf of the second respondent regarding which there is no dispute. Although there has been a delay in making the application for fresh evidence by the Appellant in the overall interests of justice it would be necessary to allow such evidence to be considered by Court at this stage.

[24] As regards the submissions in relation to the 1st requirement in **Ladd v Marshall** regarding reasonable diligence, they are based on the fact that Mr. O'Driscoll represented the Appellant and that he could have obtained the evidence that the Appellant was now seeking to submit. The affidavits filed by the Appellant and the affidavits of the second Respondent and of Mr. O'Driscoll show that the Appellant had never given any instructions to Mr. O'Driscoll which would go against this submission of the second

Respondent. The decision in **ANZ Bank v Merchant Bank of Fiji** (supra) to the effect that the Court declined to allow fresh evidence which had not been produced below and which were claimed was the fault of the lawyers, since it was alleged that the lawyer was never retained by the Appellant in this case.

[25] The submission regarding the third requirement in Ladd v Marshall, that the evidence must be apparently credible is based on the fact that there is evidence from the First Respondent's lawyers that the writ of summons was served on the Appellant which is denied by the Appellant. As stated above the record of the High Court does not bear out that position and it becomes a matter that has to be considered by this Court in relation to the competing affidavits. The submission was also made that since the evidence relates to events that took place in 2004, the second Respondent will have difficulty in obtaining evidence to rebut or counter anything allowed in by the Appellant. Although there has been a lapse of time, it is to be noted that the second respondent complied with the judgment in accepting their part of the liability and had even obtained a discharge from the 1<sup>st</sup> Respondent. The second respondent should be able to counter the evidence of the Appellant in those circumstances and as requested in the said submission they could furnish further answering affidavits if necessary.

[26] The second respondent also submitted that the Appellant had alternative remedies available to them. For the Appellant to have recourse to alternate remedies, they would have to comply with the judgment already given which would mean that they would be accepting liability. The seeking of alternative remedies is a secondary course of action that is available to the Appellant. The Appellant cannot be faulted for taking the primary course of action in obtaining redress to an injustice that they are complaining of.

[27] Taking into account all the circumstances in the overall interests of justice as stated above the application of the Appellant to lead fresh evidence is allowed. The parties would be at

liberty to file further affidavits so that a final decision could be arrived at. The parties will bear their own costs.

**Amaratunga JA**

[28] I also agree with the reasons and the conclusions of Chandra JA

[29] **Orders of the Court**

- (1) Application of the Appellant to lead evidence in the affidavit sworn by Minghua Li on 4<sup>th</sup> February 2013 allowed.
- (2) Parties entitled to file further affidavits if any within 28 days.
- (3) Parties to bear their own costs.

**Hon. Justice W D Calanchini**  
**ACTING PRESIDENT**

**Hon. Justice S Chandra**  
**JUSTICE OF APPEAL**

**Hon. Justice G Amaratunga**  
**JUSTICE OF APPEAL**