

CASE UPDATE

31 July 2019

ADDUCING FRESH EVIDENCE ON APPEAL

Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2019] SGCA 41

SUMMARY

In the recent decision of *Anan Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co) [2019] SGCA 41*, the Court of Appeal allowed an application to adduce fresh evidence for an appeal against a winding-up order.

The Court of Appeal held that where an appeal is against a judgment after a trial (or a hearing having the full characteristics of a trial), the rule in *Ladd v Marshall* [1954] 1 WLR 1489 should generally be applied in its full rigour. However, where the hearing was not upon the merits (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.

The Court of Appeal laid out a two-step analysis which courts should consider when dealing with an application to adduce fresh evidence on appeal. The overarching consideration the courts have is whether justice would be served by the decision.

BACKGROUND

Anan Group (Singapore) Pte Ltd (“Anan”) entered into an agreement with VTB Bank (Public Joint Stock Co) (“VTB Bank”) for the purchase and repurchase of certain securities (“Agreement”), the effect of which was that VTB Bank would loan Anan about USD250m with those securities as collateral.

When the value of those securities fell, VTB Bank exercised its contractual right to demand Anan to top up a cash margin as additional collateral. Anan failed to do so.

VTB Bank issued a notice of default of the Agreement, followed by a statutory demand for a

quantum of debt calculated with reference to VTB Bank’s valuation of the securities.

When Anan failed to make payment pursuant to the statutory demand, VTB Bank presented a winding-up petition against Anan which was granted by the High Court.

On appeal to the Court of Appeal, Anan argued that VTB Bank’s quantification of the debt was wrong because its valuation of the securities was unreasonable. In support of this argument, Anan sought to adduce a valuation report prepared by Deloitte which purportedly showed that no debt was owing to VTB Bank. VTB Bank objected to the introduction of the Deloitte report on the basis that it did not fulfil the requirements in *Ladd v Marshall* for fresh evidence to be introduced on appeal.

Ladd v Marshall stands for the proposition that fresh evidence may be introduced on appeal if the following requirements are met:

- (a) First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing.
- (b) Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.
- (c) The evidence must be such as is presumably to be believed (*ie* it must be apparently credible, though need not be incontrovertible).

THE COURT OF APPEAL’S DECISION

Anan’s application to introduce the Deloitte report was allowed.

THE COURT OF APPEAL’S COMMENTS

This decision clarifies the effect of the recent amendments to section 37(4) of the Supreme Court of Judicature Act and Order 57 rule 13(2) of the Rules of Court on the applicability of the *Ladd v Marshall* conditions to admitting fresh evidence on interlocutory appeals.

The Court explained that the recent amendments do not preclude the Court from taking a nuanced approach in the application of the *Ladd v Marshall* conditions in determining whether special grounds exist for the introduction of fresh evidence, and in particular by taking into account the nature of proceedings appealed against. For matters which are generally interlocutory in nature, the Court is not obliged to apply the *Ladd v Marshall* conditions

to decide whether to exercise its discretion to admit the further evidence.

While the rationale behind the *Ladd v Marshall* rule is to preserve the interests of finality in litigation and to incentivise parties to abide by the fundamental principles of fairness in their conduct of legal proceedings, these are not unassailable objectives that would always be consistent with the ends of justice in every case.

The court can admit fresh evidence notwithstanding the non-compliance of the *Ladd v Marshall* conditions in exceptional cases (*ie* where it would affront a sense of justice to refuse leave to adduce fresh evidence).

Three broad categories of cases illustrate this principle:

- (a) where new evidence reveals fraud perpetrated on the court below;
- (b) where a party was prevented from adducing fresh evidence during the hearing below in circumstances akin to denial of natural justice;
- (c) where the subject matter of the dispute was such that the stakes were particularly high or where there was a greater public interest involved, such as in child welfare or criminal proceedings.

In dealing with an application to adduce fresh evidence on appeal, the court should adopt the following two-step analysis:

- (a) First, the court should consider the nature of the proceedings below and evaluate the extent to which it bears the characteristics of a full trial;
- (b) Second, the court should determine whether there are any other reasons for which the *Ladd v Marshall* requirements ought to be relaxed in the interest of justice, with reference to the three broad categories set out above.

The court will conduct a balancing exercise between the interests of finality and the right of an applicant to put forth relevant and credible evidence, having regard to the considerations of proportionality and prejudice.

In this present case, the winding-up hearing did not bear the characteristics of a full trial even though it was a hearing on the substantive merits.

The winding-up petition was presented to Anan on 17 Aug 2018. The winding-up application was heard on 7 Sep 2018. The compressed timelines meant that it was not unreasonable for Anan to mount different arguments on appeal.

The considerations of proportionality were persuasive. Winding up proceedings are draconian in nature while no real prejudice would be caused to VTB Bank by allowing the Deloitte report to be adduced as fresh evidence.

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