

DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANG KUASA RAYUAN)

**RAYUAN SIVIL NO: J-02-28-2004**

ANTARA

HUE NGEE ON ... PERAYU

DAN

CHAI WOO SIEN sebagai Pegawai  
Awam Persatuan Hakka Kulai, Johor  
(The Hakka Association Kulai, Johor) ... RESPONDEN

(Dalam Perkara Mengenai Saman Pemula No: **24-1633-2003(2)**  
Di Mahkamah Tinggi Malaya di Johor Bahru)

Dalam perkara hartanah dikenali sebagai PTB 822, yang dipegang di bawah HS(D) 23377, Bandar Kulai, Daerah Johor Bahru bersama dengan sebuah rumah kedai 3 tingkat yang didirikan di atasnya dan dikenali sebagai No: 144, Jalan Raya, 81000 Kulai, Johor.

DAN

Dalam perkara Aturan 7 Kaedah 2(1),  
Kaedah-Kaedah Mahkamah Tinggi  
1980.

DAN

Dalam perkara Seksyen 417 dan  
Seksyen 420, Kanun Tanah Negara  
1965.

Antara

CHAI WOO SIEN sebagai Pegawai  
Awam Persatuan Hakka Kulai, Johor  
(The Hakka Association Kulai, Johor) ... Plaintiff

Dan

HUE NGEE ON ... Defendant

**CORAM:**

- (1) LOW HOP BING, JCA
- (2) HASAN BIN LAH, JCA
- (3) ABDUL MALIK BIN ISHAK, JCA

## JUDGMENT OF ABDUL MALIK BIN ISHAK, JCA

### Introduction

[1] By way of enclosure 27a, the respondent (The Hakka Association Kulai, Johor) sought for two orders, namely:

- (a) to admit, under Rule 7(1) and Rule 7(3A)(a) of the Rules of the Court of Appeal 1994, the whole of the supporting affidavit of Mr. Lee Soon Loy (enclosure 27b) affirmed on 16.1.2009 as the registration or vesting of the title to the land in question on 8.1.2004 occurred after the High Court order of 2.12.2003; and
- (b) to strike out or dismiss the appeal of the appellant.

[2] Prayer (a) of enclosure 27a prayed for the reception of fresh evidence while prayer (b) to the same enclosure prayed to either strike out or dismiss the appeal.

### Analysis

[3] The conditions stated in **Ladd v. Marshall [1954] 1 WLR 1489, C.A.**, have been followed by the English Court of Appeal for more than half a century and are in no way in conflict with the overriding objective of dispensing justice to the litigants. It must be borne in mind that it will not be in the interests of justice to re-open a

concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result of the case (this is the second of the conditions stated in **Ladd v. Marshall**).

[4] One must not distract from the fact that the question of whether fresh evidence should be received is entirely a matter of discretion to be exercised in a principled way. Whether fresh evidence is admissible upon an application under Rule 7(3A)(a) of the Rules of the Court of Appeal 1994, that is to say, that fresh evidence was not available to the respondent who wanted to use it before the High Court on 2.12.2003 or that the fresh evidence which could not with reasonable diligence have been obtained in time for the hearing before the High Court on 2.12.2003 is entirely one of subjective satisfaction for this court to satisfy itself. And may I add that whether the fresh evidence might and should have been obtained with reasonable diligence at the High Court hearing on 2.12.2003 – that will be a factor for this court to take into account in its deliberation.

[5] To object to the receiving of fresh evidence where that would trigger a re-trial as in **Ladd v. Marshall**, is entirely different from a situation where one objects to the receiving of fresh evidence on an appeal by way of a re-hearing. The distinction can be seen in **Ellis v. Leeder [1950-1951] 82 C.L.R. 645**, in the judgment of Dixon,

Williams and Kitto JJ. (at page 655) where it was said that a Court of Appeal invited to receive further evidence to enable it better to determine an appeal which is before it is exercising a different function to a court concerned with the justice of setting aside a decision obtained after a full trial and sending the case back for a new trial. In the former situation, the purpose of the further evidence is to enable the Court of Appeal to appraise the facts and be in a better position to reach a final determination of the proceeding. Now, by virtue of Rule 7(1) read with Rule 7(3A)(a) of the Rules of the High Court 1994, the power to receive evidence on an appeal by way of re-hearing is statutory and discretionary. And whether the discretion is exercised one way or the other depends ultimately on the facts of each case. However, there may be cases where it will be thought proper to admit fresh evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so as was done in **Sinanide v. La Maison Cosmeo [1927-1928] 44 T.L.R. 574.**

[6] The germane facts are set out in the affidavit in support of Lee Soon Loy that was affirmed on 16.1.2009 and my learned brother Low Hop Bing, JCA has correctly set them out in clear terms in his judgment. The land in question is the centre of dispute between the parties.

[7] The respondent sought to admit the whole of the supporting affidavit of Lee Soon Loy in order to categorically establish that the respondent is the registered proprietor of the land in question which would vest the respondent with indefeasibility of title with effect from 8.1.2004. This piece of evidence was not available before the learned High Court judge when he made the order on 2.12.2003. This was the basis and the plank of the arguments advanced by the respondent's learned counsel in the person of Dr. Wong Kim Fatt who was assisted by Mr. Wong Boon Lee in seeking to admit the supporting affidavit of Lee Soon Loy. And flowing from that, Dr. Wong Kim Fatt submitted that the appellant's appeal should be struck out forthwith.

[8] Miss HK Tan, the learned counsel for the appellant, objected to the respondent's application to admit the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. She implored this court to hear the appeal instead of striking out the appeal at this point of time.

[9] Denning L.J., in delivering a separate judgment in **Ladd v. Marshall**, laid down the law in this way (see page 1491):

“To justify the reception of fresh evidence or a new trial, 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.”

**[10]** The three conditions in **Ladd v. Marshall** must be fulfilled before this court would be prepared to receive the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. In the context of adjudicating the respondent’s application to admit fresh evidence in enclosure 27a, all the three conditions in **Ladd v. Marshall** have been fulfilled to the core.

**[11]** The three conditions laid down in **Ladd v. Marshall** may be paraphrased in this way. That the fresh evidence, firstly, could not have been obtained with reasonable diligence for use at the trial; secondly, would probably have an important influence on the result of the case, although it need not be decisive; and, thirdly, must be apparently credible, though it need not be incontrovertible.

**[12]** Then there is Rule 7(1) of the Rules of the Court of Appeal 1994 which states as follows:

**“7 Power of Court to amend, admit further evidence, or draw inferences of fact**

**(1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.”**

[13] While Rule 7(3A)(a) of the Rules of the Court of Appeal 1994 reads as follows:

**“7 Power of Court to amend, admit further evidence, or draw inferences of fact**

**(3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that –**

**(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available;..... .”**

[14] It cannot be denied that **Ladd v. Marshall** together with the statutory rules in the Rules of the Court of Appeal 1994 as alluded to above have provided a systematic and principled judicial guidance for this court to follow and adhere to.

[15] Yet, there were cases where the courts had admitted fresh evidence without reference to the principles in **Ladd v. Marshall**. This would relate to cases that turned on the legality of a ministerial decision. In an unreported dissenting judgment in the Court of Appeal vide Civil Appeal No: P-04-50-2006, **Teoh Kien Peng and Another v. Thannimalai A/L Subramaniam**, I had occasion to say something about such cases and this was what I said at pages 25 to 26, at paragraphs [44] to [45]:

**“[44] There were cases in the past where the courts had admitted fresh evidence without even referring to the principles in Ladd v. Marshall. This involved cases which turned on the legality of a ministerial decision where the evidence was not available when**

the Minister made the initial determination and where the Minister was regarded, all along, as having responsibility over the matter. In this connection, two cases immediately come to the forefront. The first would be the case of **Regina v. Secretary of State for the Home Department, Ex parte Launder [1997] 1 W.L.R. 839 at 860 to 861**. The second would be the case of **Regina v. Secretary of State for the Home Department, Ex parte Simms And Another [2000] 2 A.C. 115 at 127**.

[45] Notwithstanding the fact that the error could have been spotted by the applicant's advisers at the time of the decision by the Immigration Appeal Tribunal ("IAT"), the Court of Appeal in **Tewedros Tadesse Haile v. Immigration Appeal Tribunal [2001] EWCA Civ 663, [2002] I.N.L.R. 283** allowed the error to be rectified by adducing fresh evidence in order to show the identity of the Ethiopian political party with which the applicant was connected. Simon Brown L.J. acknowledged that the evidence would not have passed the first condition under the **Ladd v. Marshall** test because the mistake should have been noticed by the applicant's advisers before the IAT gave its decision but his Lordship was prepared to hold that the principles underlying that decision which was that there must be finality in litigation were applicable subject to the overriding judicial discretion to depart from them **provided the wider interests of justice so required.**"

[16] What appears to be just and the justice of the case are reasons that would allow for admission of fresh evidence by way of a re-hearing. I would certainly not stand in the way of doing justice to an applicant who wants to admit fresh evidence like the present application of the respondent in enclosure 27a. Permit me, once again, to refer to my unreported dissenting judgment in the Court of Appeal vide Civil Appeal No: P-04-50-2006, **Teoh Kien Peng and Another v. Thanimalai A/L Subramaniam**. There at pages 23 to 24, at paragraphs [40] to [43], I had this to say:

“[40] Should we slavishly follow **Ladd v. Marshall** or should we be freed from its strait-jacket three conditions? Sad to say, it is the courts that let the three conditions in **Ladd v. Marshall** to be compartmentalised as a strait-jacket. For my part, I will not let **Ladd v. Marshall** to stand in the way of doing justice to an individual case. Old vintage cases like **Scott v. Scott [1863] 3 Sw. & Tr. 320, 325, The English Reports volume 164, page 1298, at 1300**; and **Brown v. Dean And Another [1910] A.C. 373** should be referred to and these two cases have been overshadowed and ignored and put into oblivion since the arrival of **Ladd v. Marshall** in 1954. The court said in **Scott v. Scott (supra)** that:

‘It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time.’

[41] Lord Loreburn L.C. in **Brown v. Dean (supra)** said that 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 the ground concerns the alleged discovery of new evidence, ‘**it must at least be such as is presumably to be believed, and if believed, would be conclusive.**’

[42] Cases may arise in future where it would be proper to admit fresh evidence on an appeal by way of a re-hearing on the simple ground **that it appears just to do so** and nothing else (**Sinanide v. La Maison Cosmeo [1927-1928] vol: XLIV, The Times Law Reports 574**). An objection may be raised to the receipt of fresh evidence where that would trigger a re-trial like the case of **Ladd v. Marshall** as opposed to an objection of receiving fresh evidence on an appeal by way of a re-hearing. The distinction between these two was set out in the case of **Ellis v. Leeder [1950-1951] Vol. 82 C.L.R. 645** and there at page 655 it was held that a Court of Appeal invited to receive further evidence was to enable it to be placed in a better position to determine an appeal which was before it whereas a court concerned with the setting aside of the decision obtained after a regular trial would send the case down for a new trial.

[43] According to the case of **Sara Lee Household & Body Care U.K. Ltd v. Johnson Wax Ltd [2001] Fleet Street Reports 17**, it would require an **exceptional case** before the court was prepared to accede to an application to adduce new evidence where the applicant could not satisfy the three conditions in **Ladd v. Marshall.**”

[17] Here, factually speaking, at the time of the High Court order of 2.12.2003, the respondent was not the registered proprietor of the said land. With the admission of the fresh evidence under Rule 7(1) to be read with Rule 7(3A)(a) of the Rules of the Court of Appeal 1994 the respondent, as the registered proprietor of the said land, stands on firmer ground. According to **Peter Butt**, “**The Conveyancer – Indefeasibility and sleights of hand**” [1992] 66 ALJ 596 at page 597 that:

“Public confidence in the Torrens system depends upon the rock-solid effect of registration.”

[18] And according to the case of **Gibbs v. Messer McIntyres And Cresswell [1891] A.C. 248 at page 254**, the public faith in the Torrens system is reinforced by the indefeasibility concept which serves as a shield to protect against attacks on title. And that indefeasibility is the fundamental feature of all Torrens systems which save the persons dealing with the registered proprietors from the trouble and expense of going behind the register.

[19] In Australia, the pronouncement by Barwick CJ in **Breskvar And Another v. Wall And Others [1971] 126 C.L.R. 376 at page 385** that, “**The Torrens system of registered title of which the Act is a form is not a system of registration of title but a**

**system of title by registration”** settled, once and for all, the lingering doubts of the decision of **Frazer v. Walker And Others [1967] 1 All E.R. 649**. Since **Breskvar And Another v. Wall And Others**, the immediate indefeasibility view taken by the High Court has prevailed as the law in Australia despite the diversity in expression by other judges there particularly in **Chasfield Pty. Ltd. v. Taranto and another [1991] 1 VR 225**.

[20] Back home, we have section 340 of the National Land Code 1965 (“**NLC**”). This provision was drafted based on section 42 of the FMS Land Code 1928 and it corresponds quite closely to section 69 of the South Australia Real Property Act 1886 and this provision is paramount and it confers indefeasibility in the Malaysian Torrens system (**Teh Bee v. K. Maruthamuthu [1977] 2 M.L.J. 2 at page 10 F.C.**; and **Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 at page 460, P.C.**).

[21] Commencing from 1974, the respondent took possession of the said land for more than 34 years upon completion of the sale and purchase transaction. The appellant’s son by the name of Hue Tiam did not take any action whatsoever to repossess the said land and by virtue of section 9(1) of the Limitation Act 1953 which sets out the limitation period of 12 years, the appellant’s action in the High

Court was statute barred. There was nothing for the appellant to hold onto. Even the private caveat which the appellant entered against the said land on 9.8.2000 – some 9 years ago, had lapsed by virtue of section 328 of the NLC.

**[22]** All the facts favoured the respondent. With the admission of the fresh evidence in the form of the whole of the supporting affidavit of Lee Soon Loy, the respondent's position was further strengthened. Even with the exercise of reasonable diligence, the fresh evidence would not have been available for use in the High Court on 2.12.2003. The fresh evidence to show that the respondent is the registered proprietor of the said land was only made available on 8.1.2004.

**[23]** The admission of fresh evidence would vary from case to case and from one situation to another. The complexion to a particular case would only change and would become apparent in the light of the fresh evidence like the present application in question. Allow me to demonstrate further by referring, once again, to my unreported dissenting judgment in the Court of Appeal vide Civil Appeal No: P-04-50-2006, **Teoh Kien Peng and Another v. Thannimalai A/L Subramaniam**. There at pages 43 to 46 and at paragraphs [75] to [79], I had this to say:

“[75] I will now refer to the case of **Prentice v Hereward Housing Association and East Cambridgeshire District Council [2001] EWCA Civ 437, [2001] 2 ALL ER (Comm) 900**, not cited by either party. The facts may be stated as follows. On 6.7.1994, the claimant fell on a grassed area outside his home and suffered serious injuries to his left ankle. Proceedings for damages were commenced against the first and second defendants, with the claimant alleging that the defendants had been in breach of their duties under the Occupiers’ Liability Act 1957 and had also been negligent. The claimant and his wife both gave evidence to the effect that the claimant had gone outside his house wearing slippers, in order to shut the sun roof on his car, and had tripped in a large pot-hole. This evidence was not contradicted and the trial judge accepted the honesty of the witnesses and their account of the facts. The trial judge held that the second, but not the first, defendants were liable for the injuries. The trial judge also held that the claimant was 30% to blame for his own injuries and that being the case the claimant was entitled to 70% of the agreed damages of £340,000 and that would be for the sum of £238,000.00. The claim was handled by the second defendants’ liability insurers.

[76] The trial was reported in the local newspaper. As a result of the judgment, a number of local residents contacted the first defendant and told them that the accident had not occurred as reported in the local newspaper. This prompted the second defendants’ insurers to conduct inquiries and they succeeded in obtaining witness statements from seven local residents. The new witnesses stated that they had either seen the accident or were present in its aftermath or had been told by the claimant himself as to what had happened. Their versions were that the claimant had been bare-footed and that the accident occurred some three metres away from any pot-hole while the claimant was playfully chasing his stepson. The residents also stated in their witness statements that they were not aware that any claim had been made until they read the outcome of the trial in the local newspaper. The residents said that they were motivated in coming forward because they were shocked on learning that a false claim had been made against the defendants. Of course, all these were denied by the claimant and his wife.

[77] The second defendant then appealed to the English Court of Appeal seeking an order for a retrial so that the evidence of the additional witnesses could be considered by the trial judge. Under Rule 52.10(2) of the CPR, the English Court of Appeal has the power to order a re-trial. That provision re-enacts in the same terms as Order 59 rule 10(2) of the Rules of the Supreme Court: in the **Prentice** case the latter provision was operative because the

former had not come into force at the relevant time. The English Court of Appeal ruled that the principles applicable under both regimes were the same. Those principles had been set out in **Ladd v. Marshall**.

[78] The English Court of Appeal was satisfied that each of the requirements in **Ladd v. Marshall** had been met and that a retrial should be ordered. It was held that the new evidence was sufficiently cogent to affect the outcome of the trial and that it was on its face to be believed. It was also held that the key issue was whether the new evidence could, with reasonable diligence have been discovered by the second defendant and their insurers prior to the original trial. The claimant asserted that the insurers should have carried out investigations as to the existence of the pot-hole and as to the circumstances of the accident; and according to the claimant this could have been done either by writing to those in the neighbourhood or by sending an investigating officer to the houses of the neighbours in order to ascertain what had happened.

[79] The main judgment of the English Court of Appeal in **Prentice** was delivered by Kay L.J. The learned judge held that this type of obligation was unrealistic. Liability insurers faced with such a claim were entitled to start on the assumption that the claim presented against the assured was a genuine one rather than based on the assumption that the claim was false and had to be investigated. In the absence of anything suspicious in the claim itself or arising from the insurers investigations, the claim was to be treated as honest. Flowing from all these, the learned judge held that the insurers had acted perfectly proper and were thus entitled to have the matter re-opened since the fresh evidence had come to light.”

[24] The latitude to allow the reception of fresh evidence would depend on the facts of each case. In the circumstances, I would make those orders that were made by my learned brother Low Hop Bing, JCA.

8.6.2009

Dato' Abdul Malik bin Ishak  
Judge, Court of Appeal  
Malaysia

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