

ROCKWILLS TRUSTEE BHD (DISAMAN SEBAGAI WASI HARTA PUSAKA SI MATI, MICHAEL JOSEPH MONTEIRO) & ORS v CODE BRILLIANT SDN BHD (DALAM PENERIMAAN DAN LIKUIDASI) & ANOR

CaseAnalysis  
| [2025] MLJU 1382

**Rockwills Trustee Bhd (disaman sebagai Wasi harta pusaka Si Mati, Michael Joseph Monteiro) & Ors v Code Brilliant Sdn Bhd (Dalam Penerimaan dan Likuidasi) & Anor [2025] MLJU 1382**

Malayan Law Journal Unreported

COURT OF APPEAL (PUTRAJAYA)

LEE SWEE SENG, COLLIN LAWRENCE SEQUERAH AND CHOO KAH SING JJCA

CIVIL APPEAL NO W-02(NCVC)(W)-941-06 OF 2023

3 May 2025

## Snapshot

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**Civil Procedure — Adducing further evidence in appeal — Legal requirements for admitting further evidence in the Court of Appeal — Appellants sought to adduce further evidence in appeal — 1st respondent had obtained a judgment against Annie Lau based on the same Consent Judgment — Appellants were unaware of the OS action against Annie Lau — Whether further evidence could have been available with reasonable diligence — Whether the further evidence would have had a determining influence on the High Court's decision — Whether the respondents concealed relevant evidence — Further evidence was not available to appellants with reasonable diligence — Further evidence would likely have influenced the High Court's decision — Respondents' silence on relevant evidence akin to concealing evidence — Appellants' leave application allowed — Section 69(3) of the Courts of Judicature Act 1964 and Rule 7(3) and (3A) of the Rules of the Court of Appeal 1994**

*S Sivaneindiren (with Mark Ho, Sasha Ravindran, Milcah Yeo, Emilia Ting and Lim Jim Rui) (Chellam Wong) for the first and second appellants.  
Ho Zhi Yee (Wong Kian Kheong) for the respondent.*

## Choo Kah Sing JCA:

### GROUNDS OF JUDGMENT

## **(Notice of Motion - Enclosure 37)**

### **Introduction**

[1] The 1st and 2nd appellants filed Enclosure 37 (Notice of Motion) pursuant to s. 69 of the Courts of Judicature Act 1964 (“CJA”) read together with r. 7 and r. 27 of the Rules of the Court of Appeal 1994 (“CoA- Rules”) to seek leave to adduce further evidence at the Court of Appeal for the purposes of the hearing of the main appeal. The main appeal is against the decision of the High Court’s order dated 25.5.2023.

### **The further evidence**

[2] The further evidence that the appellants sought to adduce are the cause papers and orders in an Originating Summons action No. S24- 1859-2010 (“the OS action”) and a Bankruptcy action No. 29NCC-1786- 03/2015 (“BA”).

[3] The OS action was filed by the 1st respondent, Code Brilliant Sdn Bhd, as the plaintiff there, and one Sau Kwan Lau @ Annie Lau (“Annie Lau”) as the defendant. Annie Lau was a previous director of the 3rd appellant, Eramara Jaya Sdn Bhd (under liquidation). The 3rd appellant had withdrawn its appeal here on 30.10.2024.

[4] The OS action was in relation to an assessment of damages proceeding. The 1st respondent had successfully obtained a judgment for a sum of RM1,400,000.00 (“the OS judgment sum”) against Annie Lau. The OS judgment sum was granted by the Deputy Registrar in an order dated 26.7.2013 (“the Deputy Registrar’s Order”).

[5] With regard to the BA, the BA was petitioned by the 1st respondent here against Annie Lau based on the OS judgment sum.

### **The details of the further evidence**

[6] The further evidence that the appellants sought to adduce are exhibited as Exhibits “A2” to “A17” (“the further evidence”) in the affidavit- in-support of the 2nd appellant, Heng Ji Keng, which was affirmed on 29.7.2024 (Enclosure 38) in support of the Motion. The further evidence is detailed as below:

#### **Cause Papers in relation to the OS action**

- (i) Originating Summons and Affidavit in Support (Exhibit A-2);
- (ii) Notice of Assessment of Damages dated 28.12.2011 (Exhibit A-3);
- (iii) Code Brilliant Sdn. Bhd.’s submission dated 7.6.2013 (Exhibit A-4);
- (iv) The Deputy Registrar’s Order dated 26.7.2013 (Exhibit A-5);
- (v) Grounds of Judgment of the Deputy Registrar dated 8.7.2014 (Exhibit A-6);
- (vi) Code Brilliant Sdn. Bhd.’s submissions dated 30.9.2014 and 23.1.2015 (in relation to Annie Lau’s appeal to Judge in Chambers against the Deputy Registrar’s Order dated 26.7.2013) (Exhibit A- 7);
- (vii) Court Order (by the High Court judge) dated 29.1.2015 dismissing Annie Lau’s appeal (Exhibit A-8);
- (viii) Two unreported judgements - [2014] MLJU 1819 and [2015] 1 LNS 1393 (Exhibit A-9);

(ix) Notice of Application (*Ex-parte*) dated 8.10.2015 in respect of a garnishee proceedings and affidavit-in-support (affirmed by the 2nd respondent, the late Mr. Jambulingam Sethuraman Raki (Exhibit A- 10);

(x) Draft Garnishee Order to Show Cause dated 13.10.2015 (Exhibit A-11);

(xi) Garnishee Order dated 30.10.2015 (Exhibit A-12);

**Cause Papers in relation to the BA**

(xii) Bankruptcy Notice dated 31.3.2015 against Annie Lau (Exhibit A- 13);

(xiii) Creditor's Petition dated 4.6.2015 (Exhibit A-14);

(xiv) Summons-in-Chambers (*ex-parte*) to amend Creditor's Petition (4.6.2015) and affidavit-in-support by 2nd respondent (9.12.2015) (Exhibit A-15);

(xv) Amended Creditor's Petition dated 5.2.2016 (Exhibit A-16);

(xvi) Adjudication Order and Receiving Order (both dated 7.3.2016) against Annie Lau (Exhibit A-17).

**The Background Facts**

[7] It is instructive to set out the background facts to appreciate why the appellant sought to adduce the further evidence for the hearing of the appeal proper.

**The High Court's decision**

[8] The appeal proper is against the High Court's order dated 25.5.2023 which stated (paraphrased) as follows:

- (i) That the court (the High Court) need not re-assess the losses suffered by the 1st respondent;
- (ii) that the appellants are to pay the 1st respondent the sum of RM1,400,000.00 together with interest of 4% per annum on the judgment sum to be calculated from 7.10.2011 to the date of full settlement; and
- (iii) that costs of RM50,000.00 be paid by the appellants to the 1st respondent.

**Double recovery**

[9] It is the appellants' contention that the sum ordered to be paid to the 1st respondent by the learned High Court judge was a double recovery for the 1st respondent's loss. In order to establish that, the appellants needed to adduce the further evidence to support and prove their contention. The background facts that led to the contention of double recovery are set out as below.

[10] The parties have a chequered history which could be traced as far back as in 1996. However, what had transpired then is irrelevant to this Notice of Motion. For purpose of this Notice of Motion, it would suffice to begin with the events in year 2007.

**The 1st respondent's consent judgment – the loss**

[11] On 31.1.2007, the 1st respondent entered into a sale and purchase agreement to sell its 46 parcels of land ("the 46 parcels") to one Dynasty Industries Sdn. Bhd. ("the purchaser"). The appellants had entered private caveats over four parcels out of the 46 parcels sometime in early

year 2008. As a result of the appellants' caveats, the 1st respondent could not complete the sale, and the 1st respondent was sued by the purchaser's attorney Magnawise Consultancy Sdn Bhd for breach of the sale and purchase agreement.

[12] The 1st respondent and Magnawise Consultancy Sdn Bhd then entered into a consent judgment dated 7.10.2011 ("the Consent Judgment"). In the Consent Judgment, the 1st respondent agreed to pay RM1,400,000.00 to Magnawise Consultancy Sdn Bhd as damages for the breach of the sale and purchase agreement. This is the amount of loss that the 1st respondent asserted had suffered due to the appellant's caveats.

[13] The 1st (and 2nd respondents) then brought an action at the court below against the appellants to recover the loss of RM1,400,000.00 as a result of the Consent Judgment. On 25.5.2023, the High Court held that the appellants were liable to pay the 1st respondent, *inter alia*, the said sum of RM1,400,000.00.

[14] The appellants averred that the same amount of RM1,400,000.00 asserted to be the loss suffered by the 1st respondent had in fact been awarded to the 1st respondent in the OS action against Annie Lau.

#### **The OS action against Annie Lau**

[15] The OS action was an assessment of damages proceeding in relation to wrongful entry of private caveats by Annie Lau on the 1st respondent's lands. Annie Lau had entered these private caveats over parcels of land that were part of the 46 parcels, but they were not the same parcels as the appellants' parcels. The 1st respondent had successfully removed Annie Lau's private caveats. The 1st respondent then filed the OS action to assess the damages it had suffered. The 1st respondent asserted it had suffered loss because it had to pay Magnawise Consultancy Sdn. Bhd. the sum of RM1,400,000.00 based on the Consent Judgment (dated 7.10.2011).

[16] The appellants averred that the loss that the 1st respondent had suffered in both the present action and the OS action was the same loss which emanated from the same Consent Judgment.

#### **The findings of this Court**

[17] This Court is mindful of s. 69(3) of the CJA which states as follows:

"(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal."

[18] Section 69(3) of the CJA has to be read together with r. 7(3) and (3A) of the CoA-Rules which state as follows:

"(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.

(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; and
- (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be."

[Note: r. 7(3A) came into force on 30.10.1998 and was inserted by the **Rules of the Court of Appeal (Amendment) 1998** (PU(A) 380/1998)]

[19] The legal requirements to adduce further evidence in an appeal at the Court of Appeal are set out in r. 7(3A) (a) and (b) of the CoA-Rules. A string of cases has dealt with these rules, and it is suffice to refer to a recent Federal Court decision in *V Medical Services M Sdn. Bhd. v Swissray Asia Healthcare Co. Ltd* [2025] 4 CLJ 282, 310, wherein the apex court stated that r. 7(3A) “encapsulates the test in *Ladd v. Marshall* 3 All ER 745 , namely that, the criteria for the fresh evidence to be admitted is that the fresh evidence: (i) could not have been located or obtained with reasonable diligence prior to the hearing of the appeal; (ii) is genuine or authentic and not patently unbelievable or doubtful; and (iii) was likely to be of determinative influence in the appeal.”

[20] The test in *Ladd v. Marshall* has long been accepted as the yardstick of the law to accept fresh or further evidence at the Court of Appeal. This is found in the judgment of the Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70, even before the insertion of r. 7(3A) in 1998. The proposition of the law was later followed by another Federal Court decision in *Chai Yen v Bank of America National Trust & Saving Associates* [1980] 1 MLJ 142.

[21] In *Maxisegar Sdn Bhd v Silver Concept Sdn. Bhd.* [2005] 5 MLJ 1, 7, the Court of Appeal affirmed that the three conditions laid down in *Ladd v Marshall* are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before leave to admit fresh evidence is granted. Further, the Court of Appeal stated that the “special grounds only” mentioned in s. 69(3) of the CJA was in reference to the test as set out in r 7(3A) of the CoA-Rules which is generally known as the *Ladd v Marshall* conditions.

[22] However, the three conditions set down in *Ladd v Marshall* are not exhaustive. A fourth condition was introduced over and above the three conditions. In *Tan Ah Thong v Che Pee Saad & Anor and other cases (consolidated)* [2010] 6 CLJ 560, 568, the Court of Appeal held as follows:

“To these three conditions I would add a fourth. The further evidence must be relevant to the issues sought to be advanced in the appeal. This in my view is the overriding consideration. If the evidence is wholly irrelevant to the issues in the appeal, it matters not that the other three conditions have been satisfied.”

[23] The proposition in *Tan Ah Thong* (supra) postulates that the consideration of the test in *Ladd v Marshall* or r. 7(3A) or r. 7(3) of the CoA-Rules is not necessarily exhaustive nor has it been cast in stone.

[24] In the present case, the further evidence intended to be adduced before the Court of Appeal was indeed in existence before the order was made by the learned High Court judge on 25.5.2023. The question is whether such further evidence would with reasonable diligence have been available to the appellants for use at the court below.

[25] The appellants’ counsel submitted that sometime in early May 2024, the appellants’ solicitors came across several law reports (Exhibit A-9) in relation to assessment of damages which involved the 1st respondent and Annie Lau. The appellants’ counsel discovered that the 1st respondent had been awarded damages of RM1,400,000.00 against Annie Lau premised on the same Consent Judgment that was used against the appellants for the claim at the court below. Thereafter, the appellants’ counsel attempted to gather all the relevant cause papers in all the actions involving the 1st respondent and Annie Lau by means of file searches and by

writing to all the relevant solicitors to seek more information. The information gathered by the appellants' solicitors revealed and confirmed that it was the same Consent Judgment that the 1st respondent had relied on to claim against Annie Lau that was relied on to claim against the appellants at the court below.

**[26]** This Court is of the considered view that a party could be said to have not satisfied the test of "reasonable diligence would not have made it so available" if such further evidence was within the knowledge of the party or the party ought reasonably to have known of its existence at the material time, or it is shown that the party was indolent or had a lackadaisical attitude in obtaining such further evidence.

**[27]** In the present case, the appellants were not aware that the 1st respondent had obtained a judgment against Annie Lau in which the claim was premised on the same loss which the 1st respondent asserted to have suffered in the present case as a result of the Consent Judgment. Further, it is unreasonable to expect the appellants to be diligent in searching for information of the 1st respondent's claims (if any) against other parties which are premised on the loss suffered in the Consent Judgment.

**[28]** This Court is satisfied that the further evidence which the appellants are seeking to adduce would not have been available to the appellants with reasonable diligence before the High Court order was granted even though the further evidence was in existence before the hearing at the High Court. The further evidence could not be said to have been within the knowledge of the appellants as they were not aware the OS action had been filed by the respondents against Annie Lau. The appellants could not also have known of the further evidence as they were not a party to the OS action or the BA. The further evidence could not be said to be within plain sight of the appellants at the material time. The appellants were also not indolent nor lackadaisical in obtaining such further evidence.

**[29]** In the present case, the 1st respondent did not reveal to the court below that it had in fact obtained a judgment against Annie Lau for loss based on the same Consent Judgment, and that the 1st respondent was relying on the same Consent Judgment to claim its loss against the appellants here. This Court is of the considered view that if the learned High Court judge was apprised of the fact that a judgment had been obtained against Annie Lau based on the loss suffered by the 1st respondent in respect of the Consent Judgment as the loss in the same claim before her Ladyship, then the further evidence would have had or would have been likely to have a determining influence upon the decision of the High Court.

**[30]** Based on the above findings, this Court is satisfied that the appellants had satisfied the legal requirements of s. 69(3) of the CJA read together with r. 7(3) and (3A) of the CoA-Rules.

**[31]** Further, this Court is of the considered view that if one party has full knowledge of the existence of the fresh or further evidence which is so closely related and relevant to the issue before the court, and yet the party keeps silent of the existence of the fresh or further evidence or intentionally acts in ignorance of the existence of the fresh or further evidence, hoping that the other party would not be able to discover the further evidence, then that party could not rely on the argument that reasonable diligence would have made the fresh or further evidence available to the other party.

**[32]** Notwithstanding what has been said above, even if the further evidence was available to the appellants or the appellants could not satisfy r. 7(3A)(a) and (b) of the CoA-Rules, this Court is of the considered view that while administering the said rule, this Court must have regard to

the justice of the particular case and not only to the technical non-compliance of the said rule. This is manifested in r. 1A of the CoA-Rules. The said rule was inserted via **Rules of the Court of Appeal (Amendment) 2002** [PU(A) 196/2002]) and came into force on 16.5.2002. Therefore, it could not be said that the legal requirement of receiving fresh evidence under r. 7(3) and (3A) of the CoA-Rules mirroring the test as laid down in *Ladd v Marshall* has been cast in stone after the insertion of r. 1A of the CoA-Rules in 2002. The Court has a duty to make an order in the interest of justice, even in the face of non-compliance of the rules.

**[33]** This Court is mindful of the requirement of strict compliance of the rules of the court because it is vital for the administration of justice. The Court ought to be slow to discount any non-compliance of the rules. It is only in exceptional circumstances where justice demands a departure from the requirement of strict compliance should the court exercise its judicial discretion by invoking r. 1A of the CoA-Rules.

**[34]** This Court is of the considered view that based on the peculiar facts of this case, the respondents' action of keeping silent on relevant evidence which could be unfavorable to the respondents is akin to concealing relevant evidence before the court. These are exceptional circumstances where justice demands a departure from the requirement of strict compliance of r. 7(3) and (3A) of the CoA-Rules. Therefore, in the interest of justice, all relevant evidence ought to be presented before the Court of Appeal so that a fair and reasonable decision may be arrived at.

#### **Conclusion**

**[35]** Based on the above reasoning, this Court, in a unanimous decision, allowed the appellants' leave application in Enclosure 37 and ordered costs in the cause.