

Cache in the attic: applications to admit fresh evidence on appeal

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[*Peters v Joseph \[2026\] EWHC 775 \(Ch\)*](#)

Introduction

1. Your client has just lost at trial. The evidence he relied upon was ruled a forgery. Next week, he sends you an email. He has found some documents in the attic. They prove his evidence was genuine. 'Can we show these to the judge?' he asks, 'Can we appeal?' In this article we will consider a recent example of the High Court's approach to those questions.

Decision

2. The Defendant ('D') was the registered proprietor of a house. She claimed to have held the property on trust with her ex-husband ('PE') as joint tenants in equity before PE's death in 2019. Thereafter, she said, PE's beneficial interest passed to her by survivorship.
3. The Claimant ('C') was D and PE's son. He adduced a declaration of trust between D and PE made the year before their divorce. It said the couple held the property as tenants in common with PE holding 99% of the beneficial interest and D just 1%. He also adduced a will by which PE had left him his estate.
4. The matter came to trial in July 2024. D said the declaration of trust was a forgery. The court agreed.
5. In August 2024 C discovered new evidence:
 - a. He found a briefcase in the attic of the property which had belonged to PE. It contained letters from D in which she acknowledged her beneficial interest to be 1%;

- b. He gained access to a computer which had belonged to PE. It also contained correspondence from D in which she acknowledged a 1% beneficial interest;
 - c. He received screenshots of emails from his uncle. These were emails from D to PE, forwarded to the uncle by PE, in which D acknowledged a 1% beneficial interest.
6. C applied for permission to appeal and to adduce the newly found correspondence. He said the lower court's decision that the declaration of trust had been forged was wrong. D replied that she knew nothing of the correspondence and that it too was forged.
 7. On 18 February 2026 the matter came before Edwin Johnson J. He admitted the correspondence, allowed the appeal and remitted the case to the County Court for a retrial as to whether the declaration of trust had been forged. (The appeal was unsuccessful in respect of other grounds).

Discussion

The continuing significance of Ladd v Marshall

8. All practitioners will be familiar with Ladd v Marshall [1954] 1 WLR 1489. It says new evidence should only be admitted on appeal if:
 - a. It could not have been obtained with reasonable diligence for use at the trial;
 - b. It is such that, if given, it would probably have had an important influence on the result of the case (though it need not be decisive); and
 - c. It is apparently credible (though it need not be incontrovertible).
9. Ladd is now some 70 years old. Nevertheless it remains 'powerful persuasive authority on the question of whether new evidence should be admitted' (Peters at [58] and see Lord Phillips MR in Hamilton v Al Fayed (No. 2) [2001] EMLR 15 from [12])¹. It is notable that Edwin Johnson J structured his analysis of C's application around Ladd. But consider paragraph 86 of his judgment:

¹ For a detailed analysis of Ladd and related cases, see the judgment of Snowden LJ in Kieran Corrigan & Co. Ltd v Timol [2024] EWCA Civ 1233, from which Edwin Johnson J quotes extensively.

While the answers to the *Ladd v Marshall* questions in the present case support the admission of the Further Documents as new evidence, it is clear from the guidance given by Snowden LJ in [*Kieran Corrigan & Co Ltd v Timol* [2024] EWCA Civ 233] *that this is not necessarily the end of the question of whether the Further Documents should be admitted. I have a discretion to exercise. I have to strike the balance between the need for finality in litigation and the need for the judicial process to achieve the right result...* [emphases added]

10. So, whilst *Ladd* provides a useful structure for applications to adduce fresh evidence on appeal, practitioners must keep in mind that the ultimate question for the court is whether to exercise its discretion. That is likely to depend on balancing the need for finality in litigation with the need to get the right result².

Could the Claimant's correspondence have been obtained before the trial?

11. The first '*Ladd* question' caused Edwin Johnson J the most pause ([69-85]). Much of this has to do with the peculiar facts of *Peters*, but practitioners – particularly those representing respondents – should note paragraph 75 of his judgment:

In her submissions, [D] sought to challenge [C's] evidence ... *There has however been no actual evidence filed in response to [C's] witness statement ... I have only what [D] told me in her submissions at the Hearing. In these circumstances, it seems to me that I have to take the evidence of [C] in the witness statement at face value, subject of course to my conclusions as to its meaning and effect* [emphases added].

12. That finding was of considerable benefit to C, whose account of how he came to discover the briefcase in the attic struck Edwin Johnson J as 'rather odd'. The judge concluded he was 'bound to accept' that account because he had received no contrary evidence from D (both at [80]). This element of the appeal provides a reminder to respondents facing applications to adduce fresh evidence upon appeal that they are likely to need to produce their own rebuttal evidence if they challenge, amongst other things, the contention that the fresh evidence could not have been, with reasonable diligence, obtained for trial. (It is worth noting that in this case a relevant factor in respect of the application to adduce fresh

² In respect of which Edwin Johnson J held at [87] that '*...[I]n the exercise of this discretion in the present case, and taking into account all the relevant circumstances, it is clear to me that the balance comes down in favour of the need for the judicial process to get the right result*' [87]. The judge at [195] acknowledged this was '*... [A] highly undesirable result. It means that the parties will have to undergo a second trial ... It means further expense which, I anticipate, neither party can really afford. Nevertheless, it seems to me that these undesirable consequences do not outweigh the need to ensure a fair and just outcome...*'

evidence was the lack of any order for disclosure prior to trial, which would either have resulted in the fresh evidence being obtained prior to trial or would have raised the question of why D had not disclosed the further documents pursuant to what would have been her disclosure obligations (see [83].)

The limited role of the appeal court

13. Suppose you have persuaded the court to admit the new documents – what then? C asked for the lower court’s decision to be reversed and for a declaration that PE’s 99% share of the beneficial interest had passed to him under the will. Edwin Johnson J declined to make those orders ([97-99]). His reasoning is worth reading in full, but it boils down to two points:
- a. Whether the declaration of trust was a forgery could not be determined by reference to the new correspondence alone. That would ignore the evidence that had emerged during the trial. It was proper to remit the case back to the lower court to consider all the evidence before a determination was made;
 - b. D wished to challenge the authenticity of the new correspondence and had to be given an opportunity to do so. It would be an injustice to her if the appeal court took the correspondence at face value. The appropriate place to challenge authenticity was in the lower court, in the light of all the evidence.
14. That was, the authors would suggest, an unsurprising outcome.

The significance of ‘inherent probability’ in fraud cases

15. We have been concerned with C’s primary argument, that the lower court’s decision was wrong because it was made on incomplete evidence. But *Peters* is also interesting in its analysis of C’s backup argument, that the lower court’s decision was wrong because it did not take account of ‘inherent probabilities’.
16. In *Aldermore Bank plc v Lynch* [2022] EWHC 3050 (Ch), Fancourt J said: ‘Inherent probability of one or other side’s factual account being correct is a valuable and important consideration in a case where fraud or forgery is alleged’ (at [88]). In support Fancourt J at [89] cited the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd’s Rep 1, 57:

Speaking from my own experience, I have found it *essential in cases of fraud*, when considering the credibility of witnesses, always to test the veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also *to pay particular regard to their motives and to the overall probabilities...*[emphases added].

17. At first Edwin Johnson J was sceptical of this backup argument, which appeared to be an attack on a first instance finding of fact (see [110]):

I was not, initially, inclined to accept the argument based upon inherent probabilities. The case law contains repeated warnings to courts and tribunals not to interfere with findings of fact made at first instance, or with evaluative conclusions based upon those facts, unless there is something which constitutes an error of law. At first sight, [C's] *second argument seemed to me to constitute an attempt to re-fight factual issues from the Trial, which were for the Recorder to decide* [emphasis added].

18. But he went on to observe that D was making 'serial allegations of fraud'. It was not just the declaration of trust she alleged to have been forged; but also the will and a separate 'purchase agreement' adduced by C. It was 'reasonable to say that there was an inherent unlikelihood of all three of these documents having been forged' ([113]). And that inherent unlikelihood had not been considered below. As a result ([119]):

It seems to me that the Forgery Conclusion was flawed in the same way the decision of the first instance judge in *Aldermore* was flawed. I do not think that the Recorder [in the lower court] took proper account of the inherent unlikelihood of the serial acts of fraud alleged by the Respondent actually having taken place.

Key points

19. In summary:

- a. *Ladd* remains good law and a useful structure for making applications to admit fresh evidence, however the court retains a discretion whether to grant such an application, even if all the *Ladd* criteria are satisfied. Applicants must however remember to address the balance between the need for finality in litigation and the need to get the underlying decision right;

- b. Respondents to applications to admit fresh evidence should consider adducing evidence in response to the appellant's evidence. Failure to do so may lead to that evidence being taken at face value;
- c. Once it has admitted fresh evidence, the appeal court might well decide the lower court is better placed to make findings and to remit the matter, even if doing so is 'highly undesirable' from a costs perspective;
- d. In cases of forgery, it is a good ground of appeal if the lower court has failed to expressly consider the 'inherent probabilities' of document(s) being forged.

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