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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 25/2009

**BEFORE: THE HON. MR. JUSTICE PANTON, P.
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MRS. JUSTICE HARRIS, J.A.**

**BETWEEN: ESTATE LASCELLES SAMUEL PANTON APPELLANT
 (Represented by Mr. Desmond Panton)**

AND SUN DEVELOPMENT LIMITED RESPONDENT

Miss Carol Davis for the Appellant

**Paul Beswick instructed by Raymond Clough & Franz Jobson of Clough
Long & Co. for the Respondent**

25th March, 30th April and 29th May, 2009.

PANTON, P.

I have read the draft judgment of Cooke, J.A. and I agree with his reasons and conclusions. There is nothing further that I wish to add.

COOKE, J.A.

1. In the written submissions proffered by the appellant, there is a brief outline of the background to this matter. I will content myself in reproducing this as I think that it is sufficient for the resolution of the contending issues before the court. This outline reads:

"1.1 The matter herein concerns a dispute between 3 brothers concerning the estate of their father. The Appellant, as Executor of the Estate Lascelles Panton, contends that certain properties, known as Golden Vale and being land registered at Volume 1206 Folio 503 of the Register Book of Titles, was transferred to Lascelles Panton by Donald Panton, pursuant to certain arrangements between them. However it was subsequently discovered that the said land was registered in the name of the Respondent, a company in which the said Lascelles Panton has no known interest. Their brother Errol Panton is however allegedly a Director of this company."

2. Errol Panton, who will be an important witness for the defence at the trial, which has been set for the 27th and 28th July 2009, wishes to attend the hearing of the action by way of video link between the city of Tallahassee, in the State of Florida, United States of America and our Supreme Court. He accordingly made an application for Court Orders to realize his wish. In this application he undertook to undertake the full costs of the video link access. Reliance was placed on the following grounds:

- "1. The appellant is one of the Executors of the Last Will and Testament of Lascelles Samuel Panton, the appellant's father, and the other two Executors are Donald Panton and Desmond Panton, the remaining sons of the appellant's father.
2. That serious and irreconcilable differences have arisen between the appellant and the other executors.
3. The action is scheduled for trial on the 27th and 28th days of July, 2009, and will require the applicant to travel to Jamaica and remain for no less than 4 days including the time required for travelling to and from the Island.

4. The appellant is afraid to travel to Jamaica for the hearing as directed by the Court because he holds great fear for his personal safety in the Island.
 5. The appellant fears that he will be exposed to risk of injury and harm if he travels to the Island for the hearing scheduled for the 27th and 28th days of July, 2009.
 6. The act of travelling to and from the appellant's place of residence and business in Tallahassee, (sic) Florida, United States of America, will cause great inconvenience, expense, and dislocation to the applicant which can be avoided without detriment to the trial process if the applicant is permitted to give evidence by video link.
 7. The applicant has already successfully attended a hearing at the Supreme Court in the action herein by video link."
3. The two main factors postulated by Errol Panton were:
- (a) fear for his personal safety in the island; and
 - (b) his attendance would cause him great inconvenience, expense and dislocation both in respect of his place of residence and his business.
4. Errol Panton's application was supported by two affidavits sworn to 15th November 2007 and 6th May 2008. In the November affidavit, paragraphs 9, 12 and 13 are as follows:
- "9. Over the past 2 decades, there has been considerable estrangement between myself and my brothers Desmond and Donald. This estrangement has grown significantly since the death of our father and has escalated to the point where I have been accused by my brothers of stealing estate money and of (sic) stolen their inheritance from our father's estate.

12. That I therefore believe that my brothers hold tremendous animosity towards me. The result of this is that I am uncomfortable traveling to Jamaica to stay for any period of time as I feel exposed and fear for my personal safety in these circumstances.
 13. That I have investigated facilities for providing video-conferencing. I have had discussions with Custom Video and Video-Conferencing Capability, both companies in Tallahassee who can provide the services of vide (sic)- conferencing in Jamaica. That I am informed by my Attorneys and do verily believe that equivalent video-conferencing facilities are available in Jamaica, and accordingly that it is possible for me to be cross-examined by video-conference if the Court will permit.”
5. In the May affidavit, paragraphs 3 – 7 are as follows:-
- “3. That on the 28th day of November, 2007, a hearing took place at the Supreme Court, which I attended by way of video link. This hearing was presided over by Justice Marsh. There were no problems whatsoever with the conduct of the hearing and at all times I was able to participate as required in the proceedings. I recall specifically that at no time did the presiding Judge indicate any difficulty or compliant with the conduct of the proceedings.
 4. That in contrast, arising out of the hearing on the 28th day of November, 2007, an order was made for the parties herein including myself to engage in a mediation process. Leave was also granted for me to attend the mediation by video link. This mediation took place on the 20th day of February, 2008 at the Dispute Resolution Foundation. The video link provided at the mediation location was not as efficient as that provided as (sic) the Supreme Court, presumably because the internet connection facilities at the mediation location were simply not up to the standard required. Accordingly, there were occasional problems in the mediation proceedings due to the slow speed of the video link connection. Nevertheless, the mediation process was completed albeit it was not

successful in terms of a resolution between the parties.

5. That I therefore believe that there is no valid reason why I should not be allowed to once again use video link facilities to attend and participate in the trial of the action at the Supreme Court scheduled or (sic) the 27th and 28th days of July, 2009. I wish to also point out that in fact because of the distance of Tallahassee from Jamaica; it requires a full day of over 8 hours flying time and up to 3 airline flights to travel between these locations. This therefore necessitates at a minimum a stay in the Island of 4 days, i.e. The (sic) dates of arrival and departure, as well as the 2 days scheduled for the trial.
6. That on the last occasion, the total costs of the video link which I paid between 2 companies, one in Jamaica, and the other in Tallahassee, Florida, U.S.A., amounted to significantly less than the costs of air fare and accommodation which I would have been forced to pay had I traveled to Jamaica for the hearing. This differential would increase in the case of the trial since this is scheduled for 2 days in contrast to the previous hearing which was scheduled for only 1 day.
7. Furthermore, if I am forced to travel to Jamaica for the trial, this necessitates my leaving my business and personal commitments for several days which will cause tremendous dislocation to my business interests and personal life. All of my business interests and immediate and (sic) family and friends are in the city of Tallahassee, Florida, U.S.A where I live and work."

6. Desmond Panton in response to his brother's affidavits filed an affidavit dated 9th October 2008. Paragraphs 5, 6, 8, 10, 11, 12, 13 and 14 are reproduced as follows:-

5. Our father died in 2003. After his death my brother Errol visited Jamaica. He attended the offices of my father's Attorneys and collected my father's will. He also visited several banks where my father had bank accounts and/or safety deposit boxes.
6. Our mother passed in 2006. Errol, together with his wife and daughters attended my mother's funeral in Jamaica in August 2006, and as far as I am aware no one interfered with him in any way while he was in Jamaica. At that time there was already a dispute in the family because neither my brother Donald or myself have benefited from my father's estate although we are named as executors and beneficiaries. Despite this dispute however my brother was able to go about his normal business in Jamaica without any interference from my brother Donald or myself.
8. With regard to paragraph 12 of the said affidavit, I say that neither my brother Donald or myself intend any physical harm to our brother Errol. We have never ever touched our brother in a hostile manner, and the suggestion that either Donald or myself would do physical harm to our brother Errol is insulting and frankly preposterous. While we do have a dispute with him, we have proceeded to have that dispute adjudicated on in the Courts.
10. With regard to paragraph 2 of the 2nd affidavit, I repeat that Errol has nothing to fear from either my brother Donald or myself, whether in Jamaica or wherever else he may be located.
11. With regard to paragraph 3 of the 2nd affidavit, I say there were problems with the video-equipment. The setting up of the equipment took a long time, so that the commencement of the application was much delayed. We lost contact with Errol on at least 1 occasion during the proceedings. Further we were unable to properly discuss settlement proposals, because Errol claimed that the video link did not permit him proper access to his Attorneys for purposes of giving instructions.

12. With regard to paragraph 4 of the 2nd affidavit, I say that the video link at the mediation was of particular concern. Throughout the proceedings the reception was poor. At times we could not see and hear Errol at the same time. Most importantly Errol's behavior on the video link was abominable. He shouted and made scurrilous accusations against me. He used indecent language, which so shocked my Attorney that she was obliged to leave the room. I verily believe that unless he is present and under the control of the Trial Judge, my brother will disrupt the trial proceedings by his intemperate behaviour.
13. Further I am instructed by my Attorney-at-law and verily believe that the matter herein is likely to involve a large number of documents, to which it will be necessary to refer for (sic) purpose of conducting cross-examination. In the event that he is not present in Jamaica, it will be difficult to direct Errol to relevant sections of the documents with regard to which he will be questioned.
14. My brother Errol is now a very wealthy man. He would have no difficulty whatsoever in finding the necessary funds for travel and accommodation in Jamaica for purpose of giving his evidence in Court. I verily believe that his presence will facilitate the smooth running of the Court proceedings, and request that the application herein be refused."

7. The application was heard on the 13th October 2008. On that day

Anderson J. ordered as follows:-

- "1. The evidence of the Applicant is to be taken by video link pursuant to CPR 29.3 subject to the following conditions;
 - i. A complete agreed bundle of documents is to be provided for the witness at the place in Florida from which he will give his evidence.

- ii. Claimant and Defendant are permitted to have a legal representative present at the facility from which evidence is to be given.
- iii. Costs of bundle and attendance of Claimant's legal representative is to be borne by the Defendant.
- iv. Video Link is to be set up and tested not later than 2 clear days before the commencement of the trial.
- v. Costs of this application to be Costs in Claim.
- vi. Leave to appeal refused."

Once again the court bemoans the fact that neither was there a written judgment nor an agreed note by counsel of the reasons given for the making of the order.

8. The appellant, feeling aggrieved by the order of Anderson J. has appealed, the grounds of which are listed below:

"4. That the Learned Trial Judge erred in granting the application to permit Mr. Errol Panton to give his evidence by video link from Tallahassee for reasons as follows:

- (i). The General Rule as set out at Rule 29.2(1) of the CPR is that evidence at trial is to be given by oral evidence given in public. Orders for evidence to be given by video link from abroad should therefore be made only where there is good reason for evidence to be given otherwise, and in the instant case no proper reason for seeking to give evidence by videolink was put before the court.

- (ii). The main reason given by Mr. Errol Panton, the representative of the Defendant, for not wishing to travel to Jamaica for the trial, was that he feared that he will be exposed to injury and harm, impliedly from his brothers (including the applicant) with whom there is a dispute. This reason is strongly denied by the Applicant herein, and there was no evidence before the Court of any previous threat or physical assault on Mr. Errol Panton.
- (iii). The granting of the Order is highly prejudicial to the Appellant. By granting the Order, the Court was impliedly accepting that Mr. Errol Panton was properly fearful of traveling to Jamaica, and thus that the Applicant herein and his brother Donald Panton are villains of whom Mr. Errol Panton has good cause to be fearful. Since the 3 brothers are likely to be witnesses before the Court, it is prejudicial that even before the trial begins there is a judicial pronouncement that impugns the character and thus credibility of any of the potential witnesses.
- (iv). In his affidavit in support of the application Mr. Errol Panton said that he lived in Tallahassee, (sic) Florida, United States of America. Both the Claimant and the Defendant are permitted pursuant to the Order to have representatives attend at the facility (presumably in the United States) from which the evidence is to be given. The effect of such an order would be to vastly increase expense, which is contrary to the overriding objective set out at Part 1.1(b) of the CPR.
- (v). The increased expense occasioned by the Order herein is prejudicial to the Appellant.
- (vi). The Court Ordered that a complete agreed bundle of documents be provided for the witness in Tallahassee. However at this stage of proceedings witness statements are not yet

before the Court, and there was no evidence that it was likely that the documents required for the trial would be agreed.

- (vi). From the evidence before the Court, previous attempts at giving evidence by video link had encountered technical difficulties, and resulted in delays.
- (vii) The Court failed to take into consideration the undisputed evidence that at a previous instance where videolink was used, Mr. Errol Panton behaved in an inappropriate manner, such that it is necessary for him to attend before the Court to be properly under the control of the Trial Judge."

9. The relevant rules of the Civil Procedure Rules 2002 are 29.2 (1) and

29.3. Rule 29.2 (1) states:-

"The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –

- (a) at trial, by their oral evidence given in public; and
- (b) at any other hearing, by affidavit."

Rule 29.3 states:-

"The court may allow a witness to give evidence without being present in the courtroom, through a video link or by any other means."

The issue to be determined by this court is whether the discretion exercised by the court below ought to be disturbed. The respondent forcefully grounded its opposition to the contentions of the appellant on the platform that the exercise of the trial judge's discretion can only be faulted if there is very good reason for

doing so. I am aware of this caveat and my approach will be so suitably informed.

10. It is obvious that evidence given through a video link is not within the general rule. Accordingly, there must be sufficient circumstances to justify a departure from the general rule.

11. The lone case brought to the attention of the court by the appellant was **Polanski v Condé Nast Publications Limited** [2005] UKAL 10. In this case the appellant had brought an action against the Respondent for libel. The appellant lived in France and had been so living for a considerable number of years. The trial of the action was to take place in England. However, the appellant was a fugitive having fled from the United States after pleading guilty in California to a charge of unlawful intercourse with a girl aged 13 years. Because of his fugitive status, the appellant feared that because of the Extradition Treaty between England and the United States, he would be in danger of being reduced into custody pending extradition proceedings. In the court of first instance Eady J. granted permission for the appellant to give his evidence by video conference link. The Court of Appeal held that Eady J. had misdirected himself in permitting the appellant to give evidence by video link. The House of Lords in a majority judgment (Lord Carswell dissenting) restored the order of Eady J. Lord Nicholls of Birkenhead said in his speech at paragraph 10:

“The issue is whether the administration of justice would be brought into disrepute if the judge’s order were allowed to stand.”

12. Although Polanski was concerned with the specific issue set out above, their Lordships made some useful comments on the application of the provision to allow the reception of evidence through a video link. The corresponding English provision is their C.P.R. part 32 our Rules 29.2 (1) and 29.3 are modelled on that part. In paragraph 14, Lord Nicholls said:

“Whether Mr. Polanski’s reason (for wishing to give evidence through video link) is sufficient is the all-important question.”

In par. 21 he recognized that:

“... recent advances in telecommunication technology have made video conferencing a feasible alternative way of presenting oral evidence in court.”

In par. 26 he opined that:

“The powers conferred by the rules (to allow evidence through a video link) is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an ‘indulgence’.”

In par. 11, he made reference to the Practice Direction supplementing CPR Part 32 that provides that when the use of video conferencing is being considered a judgment must be made on cost saving and on whether use of video conferencing “will be likely to be beneficial to the efficient, fair and economic disposal of the litigation”.

In par. 41 Lord Slynn of Hadley also made reference to this Practice Direction which recognized that:

"[VCF] is, however, not as ideal as having the witness physically present in court..."

In par. 51 he questions whether –

"there is a valid self-standing reason for allowing the evidence to be given by video link..."

In par. 69 (5) Baroness Hale of Richmond indicated that a criterion was whether or not the applicant should demonstrate an acceptable reason for seeking VCF order.

Lord Carswell said at par. 84:

"Certain matters are not in dispute. The technology used in giving evidence by VCF is good, so that there is little disadvantage to the other party, as Eady J said in his ruling to which I shall refer. That disadvantage has not, however, been entirely eliminated, and it is to be noted that in para 2 of the VCR Guidance set out in Annex 3 to Practice Direction – Written Evidence, set out in section 32PD.33 of the CPR, it is stated, after the advantages have been enumerated:

'It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to indicate its use ... In particular, it needs to be recognised that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it'.

13. We do not have the Practice Directions to which their Lordships House adverted in *Polanski*. However, I accept those considerations as being useful in

resolving the issues in this appeal. I will now set out in summary the criteria which will inform my judgment in this particular case.

(i). The critical question to be answered is whether there is sufficient reason for departing from the general rule that a witness should be present in court when giving evidence.

(ii). In answering the question the court should have regard to:-

- (a) The fact that the giving of evidence by video link is not an "indulgence". Rule 29.3 makes such a provision.
- (b) Evidence by way of a video link is not as ideal as having the witness physically present in court.
- (c) The use of a video link as being technologically suitable.
- (d) The convenience of the use of a video link should not dictate its use.
- (e) The degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it.
- (f) Overall, it must be considered whether the utilization of a video link "will be likely to be beneficial to the efficient, fair and economic disposal of the litigation".
- (g) There also be consideration of prejudice .

14. I now turn to the grounds of appeal. Ground 4 (iii) is without merit. It must be accepted that learned trial judges are by training and experience and not in the least by natural inclination, predisposed to being objective. It is

doubtful that this episode in the proceedings would be part of the trial judge's bundle(s). In any event there has been no judicial pronouncement that impugns the character and thus credibility of any of the potential witnesses. Further, this will not be a jury trial. The risk envisioned by the appellant is illusory and quite baseless. No prejudice will be occasioned to the appellant as was submitted.

15. Ground 4 (iv) speaks to "vast increase in expences which is contrary to the overriding objective set out at Part 1.1 (b) of the CPR". As Errol Panton is to pay all the attendant costs of the video link exercise, this ground must fail.

16. The first ground 4 (vi) envisaged difficulty in the compilation of a complete agreed bundle of documents. Let that which is agreed be sent. Other contentious documents can be dealt with in the normal way during the course of the trial. This ground fails.

17. The second ground 4 (v1) speaks to technical difficulties in previous attempts at giving evidence by video link. This apprehension is misplaced. The giving of evidence by video link has been successfully employed in proceedings in the Supreme Court without complaint. I would say that the employment of a video link is technologically suitable and would in no way adversely affect the conduct of the trial. This ground fails.

18. Grounds 4 (i) and (ii) goes to the heart of the debate. For these grounds the appellant submitted that "no proper reason for seeking to give evidence by

video link was put before the court.” It is my view that there is substance in this complaint. Errol Panton relies on a bald assertion that he feels exposed and fears for his personal safety because of the tremendous animosity which his brothers held towards him (see para. 12 of affidavit of 15th October 2008) ... Desmond Panton’s affidavit of 9th October 2008, at par 8, roundly refutes this and states that disputes were referred to the court. I do not think that Errol Panton has established any evidential basis on which it could be demonstrated that his fear of physical harm is honest and genuine. In respect of par 7 of Errol Panton’s affidavit of 6th May 2008 which speaks to “tremendous dislocation to my business interest and personal life” there is no evidential bases to substantiate his assertion. I would have expected a demonstration as to how his personal life and business interests would be dislocated. There was none. It would obviously be more convenient for Errol Panton to give evidence by video link, but this convenience is not to dictate its use. I do not consider the fact that Errol Panton will stand all the costs to be of telling significance. Litigants with deep pockets should not for that reason dictate the use of a video conference link.

19. Ground 4 (vii) is also of substance. In par 12 of Desmond Panton’s affidavit, there is the unchallenged evidence that during a video link mediation exercise Errol Panton conducted himself in a reprehensible manner. He made “scurrilous accusations against me “and he used indecent language.” It has been submitted that this is evidence which indicates the necessity for Errol

Panton to attend before the court to be properly under the control of the trial judge. I agree. The signs portend that the trial will be very vigorous. The seething animosity between the Panton brothers, will perhaps erupt during the trial. It is necessary in my view, for the learned trial judge to have a present and immediate control of all the witnesses. The learned trial judge may well be forced to employ sanctions which may be ineffectual in respect of a witness giving evidence at a remote site. This is a serious consideration which would detract from the efficiency of the trial.

20. Because of the foregoing, I am compelled to disturb the discretion exercised by the court below. That court did not properly analyse the evidence pertaining to the issues before it. There was no sufficient reason to depart from the general rule that a witness should attend in person to give evidence. I would allow the appeal. I would further award costs to the appellant both in this appeal and in respect of the hearing in the court below.

HARRIS, J.A.

I agree.

PANTON, P.

The appeal is allowed. The Order of Anderson, J made on October 13, 2008, is set aside. Costs are awarded to the appellant both in this appeal and in respect of the hearing in the court below, to be taxed if not agreed.