[2012] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 53/2012

BETWEEN	RAZIEL OFER	APPELLANT
AND	GEORGE C. THOMAS	1st RESPONDENT
AND	GEORGE C. THOMAS & CO. (A Firm)	2nd RESPONDENT
AND	CECIL ANTHONY BIRD	3rd RESPONDENT
AND	RON STANECKEY	4th RESPONDENT
AND	DAVID LEIBOVITZ	5th RESPONDENT
AND	JOHN B. CHUCK	6th RESPONDENT
AND	THE VILLAS-NEGRIL LIMITED	7th RESPONDENT
AND	FROLIC RESORT LIMITED	8th RESPONDENT

Maurice Manning and Weiden Daley instructed by Hart Muirhead Fatta for the appellant

Mrs M. Georgia Gibson-Henlin instructed by Mrs Jacqueline Samuels-Brown QC for the 1st and 2nd respondents

3rd to 8th respondents not appearing or represented

14 and 18 May, 12 June 2012

PROCEDURAL APPEAL

IN CHAMBERS

MORRISON JA

[1] This appeal is concerned with rule 29.3 of the Civil Procedure Rules 2002 ('the CPR'), which provides as follows:

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

[2] On 23 April 2012, Pusey J made an order refusing the appellant's application that he be allowed to be cross-examined in interlocutory proceedings by way of video link. The question which arises on this appeal is whether this was a proper exercise of the judge's discretion under rule 29.3.

[3] The background to the matter may be briefly stated. In an action commenced by the filing of a claim form in the Supreme Court on 19 December 2011 (Claim No. 2011 HCV 08015), the appellant claims against the 1st to the 8th respondents a number of reliefs and remedies. As against the 1st and 2nd respondents, he claims damages for negligence and restitution of the sum of US$725,000.00.

[4] On 7 March 2012, on the appellant's without notice application, supported by an affidavit sworn to by him on 21 February 2012, Straw J granted a freezing order and ancillary relief against all the respondents, except the 2nd respondent. On 13 March 2012, which was the date set for further consideration of the matter, Campbell J adjourned it to 1 May 2012, for one day. On the oral application of counsel for the 1st and 2nd respondents, the learned judge also ordered that the appellant should attend on that date for cross-examination on his affidavit.

[5] On 29 March 2012, the appellant filed an application, for an order varying Campbell J's order for his attendance for cross-examination, by permitting him to be cross-examined by way of video link under rule 29.3. The appellant also relied on rules 26.1(7) and 26.1(2)(o) of the CPR. The grounds of the application were set out in an affidavit sworn to by the appellant on 27 March 2012. As much turns in this appeal on what was said by the appellant in his affidavit, I will set it out in full:

> "1. My address is 116 W 22nd Street, PH-B, New York, NY 10011, United States of America. I swear this affidavit from facts and matters within my own personal knowledge, save where stated by me to the contrary, and I believe the contents of this affidavit to be true.
>
> 2. I have been informed by my Attorneys-at-Law in these proceedings that upon the 1st and 2nd Defendants' oral application on 13th March 2012 during the hearing in this claim, the Honourable Mr. Justice Campbell ordered that I am to attend court on 1st May 2012 for cross-examination. I exhibit a copy of the order as "**R.O.1**".
>
> 3. I am a citizen of the State of Israel, a permanent resident of the United Kingdom, and I reside and work in the state of New York in the United States of America ("the USA"). I exhibit a copy of the first two pages of my passport as "**R.O.2**". I have several business and considerable financial interests in the USA, among them are several hotels and apartments in New York being Woogo Central Park Hotel, Broadway Apartments, Lincoln Apartments, Edison Hotel and Belnord Hotel. These properties are owned and they are managed or leased by companies I own (incorporated in the United States of America), the ultimate parent company being my company Woogo USA Inc.
>
> 4. I confirm I am entirely ready and willing to be cross-examined at any time in these proceedings.

However, my present immigration status in the USA does not permit me to return home here in the USA if I were to travel from the USA to be cross-examined in Jamaica on 1st May 2012. In addition, travelling from the USA would terminate my immigration benefits here in the USA. I exhibit as **"R.O.3"** a copy of a letter, dated 22nd March 2012, from my Attorneys-at-Law in the USA who deal with my USA immigration matter.

5. I am completely ready, willing and able to fund my being cross-examined aforesaid by live video link. In the circumstances, I humbly and respectfully ask this Honourable Court to permit my being cross-examined on 1St May by way of live video link instead of by attending Court."

[6] The letter dated 22 March 2012, which is referred to at paragraph four of the affidavit ("R.O.3"), was written over the signature of the appellant's attorney-at-law, Mr David Frenkel, of the New York firm of Frenkel, Hershkowitz & Shafran LLP. It stated the following:

> "It is my understanding of [sic] Mr. Raz Ofer is scheduled to testify in Jamaica on May 1, 2012 in connection with [this] matter. Unfortunately, there are several significant issues relating to his immigration status in the United States which have not yet been resolved and which preclude his departure from the US.
>
> If Mr. Ofer departs from the US at this time, he will not be permitted to return and the US immigration benefits that he is seeking will be terminated.
>
> Should you require further information, please contact me."

[7] On 23 April 2012, Pusey J refused the appellant's application, on the grounds that (i) the appellant had not provided sufficient evidence of his US immigration status which

makes it impossible for him to travel to Jamaica, and (ii) in the light of the closeness of the hearing on 1 May 2012, the appellant had not provided evidence in his affidavit of the arrangements to be made for the hearing by video conferencing to satisfy the court that the facilities could be put in place in time for the hearing on that date. It might have been different if the application had related to a trial fixed for October or November 2012. It also appears that, when it became clear that the learned judge was not minded to make the order on the basis of the material before him, an offer by the appellant's counsel to provide the court with a supplemental affidavit containing such further information as the judge might require was declined.

[8] By notice of appeal dated and filed on 23 April 2012 (and with the leave of the judge), the appellant appealed on the following grounds:

> "i. In refusing to grant the order the learned judge in chambers did not have adequate regard to the fact that the details contained in the letter dated March 22, 2012 from the Appellant's Attorneys Messrs. Frenkel, Hershkowitz & Shafran was sufficient to corroborate the Appellant's own evidence in his affidavit dated March 27, 2012 and satisfy the Court that he was unable to travel for the hearing on May 1, 2012 and that any further information from the Attorneys-at-law may well have been a breach of Attorney/client privilege.
>
> ii. The learned judge did not have any adequate regard to the fact that while he was declaring that the information was insufficient to make a judicial determination on the application he was in fact making such a determination without giving the Appellant's Attorneys-at-law an opportunity to put before the court a supplemental affidavit, having regard to the fact that no other evidence existed to contradict the Appellant's statement at paragraph 4 of his affidavit that travelling

would result in a termination of his immigration benefits.

iii. In positing that the situation might have been different if the substantive hearing was months away in October or November the learned judge was making a determination that the mechanism for establishing the video-link was not possible without any evidence enabling him to make that decision.

iv. The learned judge unjustifiably confused the right of a party to invoke the use of available technology to facilitate cross examination in chambers with the consequence of making such an order which would mean further directions and consequential orders as to how the process should be enabled to mainitaiin [sic] the integrity of cross examination.

v. The learned judge failed in having any adequate or any regard to the overriding objective of dealing with cases expeditiously and justly by permitting the reliance of a litigant on available technologies as the circumstances permit and pursuant to Part 26.1(1)(O) [sic] and Part 29.3 of the Civil Procedure Rules."

[9] Before coming to the submissions on the appeal, I should say for completeness that, on 26 April 2012, on the appellant's application for a stay of the *inter partes* hearing set for 1 May 2012 pending the hearing of this appeal, I made an order staying the hearing in the court below for a period of 14 days, save and except for the purpose of considering any further extension of the freezing order. After further orders made by Mangatal J on 1 and 11 May 2012, the matter is now fixed for directions on 21 May 2012 and for hearing on 30 May 2012.

[10] Turning now to the appeal itself, Mr Manning for the appellant submitted that Pusey J ought to have granted the application on the basis of the evidence before him,

particularly in the light of the consequence of a refusal of the order, which is that the appellant might be precluded from reliance on his affidavit at the *inter partes* hearing in the event of his non-attendance for cross-examination. No injustice or disadvantage from cross-examination by live video link had been alleged by the 1st and 2nd respondents; while on the other hand the appellant will stand to suffer devastating consequences personally and in his financial affairs, if he is not permitted to submit himself to cross-examination by this means.

[11] Mr Manning submitted further that rule 29.3 is intended to allow a litigant to utilise technology to expedite proceedings and that the learned judge ought not to have approached the exercise of his discretion under the rule in a way that deprives the rule of its potency. The benefit of cross-examination to the 1st and 2nd respondents can be adequately secured to them under the rules by means of a live video link. Finally, it was submitted, the affidavit of the appellant and in particular the letter from his attorney-at-law provided a sufficient basis for the making of the order and this was clearly not a case in which the order was being sought for the purpose only of the convenience of the appellant.

[12] In support of these submissions, I was referred by Mr Manning to the well-known decision of the House of Lords in ***Polanski v Condé Nast Publications Ltd*** [2005] 1 All ER 945 and the subsequent decision of this court in ***Estate Lascelles Samuel Panton v Sun Development Ltd*** (SCCA NO 25/2009, judgment delivered 29 May 2009).

[13] Mrs Gibson-Henlin for the 1st and 2nd respondents reminded me at the outset of her submissions that this is an appeal from the learned judge's exercise of a discretion, and that in these circumstances this court is not entitled to exercise an independent discretion, unless on all the evidence before him, the judge could not have come to his decision.

[14] With reference to ***Polanski***, Mrs Gibson-Henlin pointed out that that decision turned on the adequacy of the reason proffered by the applicant for permission to utilise video link facilities and not on the efficacy of the use of such facilities. It was accordingly important that the reason put forward be sufficient, clear and forthright, all of which qualities were lacking in the instant case, in which the appellant's reason is "vague and insubstantial". Pusey J was therefore correct to regard the reason given for seeking the order as insufficient, as this court had done in respect of the reasons given by the applicant in ***Panton***.

[15] Mrs Gibson-Henlin submitted further that what the appellant was asking Pusey J to do was to vary the previous order made by Campbell J that he should attend for cross-examination on his affidavit, but he had not advanced any basis for such a variation. What was required by rule 26.1(7) of the CPR was for the appellant to satisfy the court that there had been some change of circumstances between 13 March 2012, when Campbell J's order was made, and 27 March 2012, which is the application for permission for the appellant's cross-examination to be done by way of video link was filed. On this point, Mrs Gibson-Henlin relied heavily on the decision of Harris JA in ***Norman Harley v Doreen Harley*** [2010] JMCA Civ 11, in which that learned judge

observed (at para. [41]) that a court "will only revisit an order previously made if an applicant, seeking to revoke that order, shows some change of circumstances or demonstrates that a judge who made the earlier order had been misled". The appellant in the instant case had failed to do this and Pusey J had therefore been correct to refuse the application for permission to give evidence by video-link.

[16] Finally, as regards the consequences to the appellant of a refusal of the order sought by him, Mrs Gibson-Henlin made the point that it did not automatically follow that, if the appellant did not attend for cross-examination at the *inter partes* hearing, he would be excluded from relying on his affidavit, as it would still be open to him to seek the court's permission to do so under rule 30.1(5) of the CPR.

[17] ***Polanski*** is the leading case on rule 32.3 of the English Civil Procedure Rules 1998 ('CPR 32.3'), which is the equivalent of rule 29.3. The appellant in that case, Mr Roman Polanski, was a citizen of France, who was at the material time also a resident of that country. In 2004, he was, and had been for in excess of 25 years, a fugitive from justice in the United States of America ('the USA'). In an action for libel brought by him in the United Kingdom ('the UK') against Condé Nast Publications Ltd ('Condé Nast'), the publishers of the well-known 'Vanity Fair' magazine, he sought permission from the court to give his evidence from France by means of a video link, pursuant to CPR 32.3, which is in terms virtually identical to rule 29.3. The basis of his application was his fear that, if he went to the UK for the trial, he would run the risk of being extradited to the United States. The issue on appeal was whether it would be right for the court to exercise its discretion in favour of Mr Polanski, a fugitive from justice, by

permitting him to give his evidence by video link, or whether by allowing him to do so the administration of justice would be brought into disrepute.

[18] The House of Lords held, by a bare majority, that the general rule should be that in respect of proceedings properly brought in the domestic courts, a claimant's unwillingness to come to the UK because he was a fugitive from justice was a valid reason, and could be a sufficient reason, for making a video conferencing order. On this basis, Mr Polanski was entitled to the order sought by him.

[19] Delivering the leading judgment, Lord Nicholls of Birkenhead observed at the outset (at para. [14]) that "Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF [video conferencing] as it could be if given in court". Lord Nicholls also referred to the comment at first instance by Eady J, an experienced judge, that cross-examination by VCF takes place "as naturally and freely as when a witness is present in the court room". Further, he commented (at para. [21]) that "recent advances in telecommunication technology have made VCF a feasible alternative way of presenting oral evidence in court". Finally in this vein, Lord Nicholls said this (at para. [27]):

> "...a direction that a fugitive such as Mr Polanski may give his evidence by use of VCF is a departure from the normal way a claimant gives evidence in this type of case. But the extent of this departure from the normal should not be exaggerated. It is expressly sanctioned by the CPR. The power conferred by the rules is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an 'indulgence'."

[20] To similar effect is the observation of Lord Slynn of Hadley (at para. [43]), that "although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological developments, evidence by video link is both an efficient and effective way of providing oral evidence both in-chief and in cross-examination". (See also on this point the judgments of Lord Hope of Craighead, at para. [68], Baroness Hale of Richmond, at para. [80], and Lord Carswell, at paras [84] and [93], see further the decision at first instance in ***Rowland v Bock*** [2002] 4 All ER 370, which was expressly approved by Lord Nicholls in ***Polanski*** at para. [33] as having been "correctly decided", in which Newman J said at para. 9 that "No defined limit or set of circumstances should be placed upon the discretionary exercise to permit video link evidence.")

[21] As to the question of potential prejudice to Condé Nast arising from the grant of permission to give evidence by video link to Mr Polanski, Lord Nicholls pointed out (at para. [13]) that although –

> "...objections to the form in which evidence may be given at the trial usually arise when one party claims a particular course would be prejudicial to him in the conduct of the litigation. That is not so in the present case. Condé Nast has no relevant interest in Mr Polanski being required to give his evidence in person in court. A direction that Mr Polanski's evidence may be given by means of video conferencing, or 'VCF' in short, would not prejudice Condé Nast to any significant extent. If anything...any prejudice would be more likely be suffered by Mr Polanski, by reason of the lessened impact of his evidence and celebrity status on the jury."

(See also Lord Slynn's observation, at para. [45], that "it is not established that [Conde Nast] would be adversely affected by the use of the video evidence", and Baroness Hale's similar comment at para. [69].)

[22] The essential issue in the case, however, upon which the House was narrowly divided, surrounded the effect of Mr Polanski's status as a fugitive from justice. Lord Nicholls formulated the issue in this way (at para. [20]):

> "A fugitive from justice is unwilling to come to this country to give evidence in person in civil proceedings properly brought by or against him. Can that be a sufficient reason for making a VCF order? Or would such an order, made for that reason, bring the administration of the law into disrepute?"

[23] After considering the competing public policy interests, Lord Nicholls (with whom Lord Hope and Baroness Hale agreed) concluded that a law which allowed a fugitive to bring proceedings in the UK, but at the same time withheld from him the benefit of a readily available modern technological development, "would lack coherence" (para. [32]). On this basis, Mr Polanski was held by the majority to be entitled to the order sought by him.

[24] In ***Panton***, rule 29.3 was directly in issue. In a dispute between three brothers concerning the estate of their late father, one of the brothers, who was an important witness for the defence at trial, sought permission to participate in the hearing by video link from Tallahassee, in the State of Florida in the USA. His reasons for seeking the order were that (i) he was afraid to travel to Jamaica, because he feared for his personal safety in the Island; (ii) absence from his home and business in Florida would

cause him great inconvenience, expense and dislocation; and (iii) he had already participated successfully in a previous hearing in the same proceedings by video link.

[25] The application was strongly opposed by the applicant's brothers, who refuted any implication or suggestion that either of them had ever threatened or caused him, or intended to cause him physical harm of any kind. They also challenged the contention that the applicant's business would suffer in any way, pointing out that he was a wealthy man, who could well afford the cost of travel to and accommodation in Jamaica. They further challenged his suggestion that the previous hearing at which the applicant had participated by video link had been successful or uneventful. It was asserted that the internet connection on that occasion had been poor and that, in any event, their brother's behaviour had been "abominable", leading them to apprehend that, unless he were "present and under the control" of the trial judge, he would "disrupt the trial proceedings with his intemperate behaviour".

[26] The judge in the court below granted the application, but an appeal to this court succeeded. The leading judgment was delivered by Cooke JA, with whom Panton P and Harris JA agreed. Cooke JA at the outset located the application (at para. 9) within the context of rule 29.2(1), which states as follows:

> "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."

[27] After setting out rule 29.3, the learned judge then said this (at para. 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 departure from the general rule."

[28] Cooke JA then went on to consider ***Polanski*** and (at para. 13) accepted some of the factors set out in the judgments in that case "as being useful in resolving the issues in this appeal". He then set out the following summary of the criteria which he considered applicable to a determination of the matter:

> "(i) The critical question to be answered is whether there is a 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 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 [sic] the consideration of prejudice."

[29] Applying these criteria to the matter before the court, Cooke JA concluded (at para. 19) that the appeal should be allowed, primarily on the basis that no evidential basis had been shown for the applicant's assertions that his attendance in Jamaica for trial would either jeopardise his personal safety or create great dislocation in his personal and business life. But further, he also considered that there was substance in the expressed fear that the applicant's behaviour might be difficult to control, if he were not present in person to submit to such control and, if necessary, sanctions, as the trial judge might feel obliged to employ may be ineffectual because the applicant would be giving evidence from a remote location.

[30] I fully accept, as naturally I must, that ***Panton*** represents this court's only considered discussion on the true scope of rule 29.3 and that, as such, I am bound to give effect to it, insofar as it is applicable to the instant case. However, I think that in some respects it is plainly distinguishable and may not to that extent necessarily be decisive of this appeal. In the first place, unlike in ***Panton*** (or indeed in ***Polanski***), the appellant's application in the instant case was for permission to give evidence by video link in interlocutory proceedings, while the "general rule" referred to in rule 29.2(1)(a) is by its terms only applicable to evidence to be given at trial. It therefore seems to me that Cooke JA's formulation in ***Panton*** (see para. [25] above), which requires that there be "be sufficient circumstances to justify departure from the general rule", may not be entirely apt in respect of interlocutory proceedings. It seems to me

further that what is required in the instant case, as indeed in any case, is for the court to ensure that any order it makes pursuant to rule 29.3 is consonant with the overriding objective (rule 1.1) and, as Cooke JA put it (quoting an English Practice Direction which does not exist in Jamaica – see para. 26(ii)(f) above), "will be likely to be beneficial to the efficient, fair and economic disposal of the litigation". In this regard, and in the instant context, I would also want to bear in mind Baroness Hale's telling observation in ***Polanski*** (at para. [79]), that "[t]he considerations applicable to satisfying the overriding objective when an action is being tried are obviously different from those applicable at the interlocutory stage".

[31] I would also distinguish ***Panton*** from the instant case on a purely factual basis. Despite the fact that the 1st and 2nd respondents, supported in this by Pusey J, question the sufficiency of the evidence put forward by the appellant as justifying his seeking permission to be cross-examined by video link, there is no direct challenge, as there was in ***Panton***, to the truthfulness of the appellant's assertion, supported by his attorney, that should he be required to leave the USA at this time to attend court in Jamaica, he will not be permitted to return. And lastly, there is absolutely no evidence in the instant case, as there was in ***Panton***, that the appellant is likely to be the kind of unruly witness who it may be impossible or difficult to contain during cross-examination from a remote location.

[32] But subject only to these limited observations on the latter case, I consider that both ***Polanski*** and ***Panton*** provide valuable guidance on the factors that should inform the court's consideration of an application for permission to give evidence by

video link. It is clear that pre-eminent among these must be the reasons given by the applicant for seeking the order. In the instant case, Pusey J considered, as has already been seen, that the reasons given by the appellant were not "sufficiently detailed" to enable the court to determine their adequacy in the context of rule 29.3. I have, with the greatest of respect, found this conclusion difficult to understand. The appellant did not merely throw at the court his own bare assertion of the likely consequence of his leaving the USA at this time. Rather, he supported it with a definitive statement from his attorney-at-law, whose bona fides or competence to make it have not been challenged in any way, that if the appellant "departs from the US at this time, he will not be permitted to return and the US immigration benefits that he is seeking will be terminated". It is not at all clear to me how further details, presumably such as reference to the applicable US immigration statutes and regulations, might have been of assistance in circumstances in which it was not being contended in opposition to the application that the true position was otherwise than as stated by either the appellant or by Mr Frenkel on his behalf. Far from being "vague and insubstantial", in Mrs Gibson-Henlin's dismissive phrase, I would consider the appellant's stated reason for seeking the order to be precise and the issue of a possible compromise of his immigration status in a country in which he obviously has at least some economic roots to be a matter of substance.

[33] Indeed, I would have thought that the appellant's stated reason for seeking the order was not dissimilar to Mr Polanski's fear that a visit to the UK for the attendance at the trial might lead to his extradition to the USA. Both reasons, it seems to me,

involved some element of speculation, albeit informed, that the respective authorities would act in a certain way based on known history and legal advice. In assessing the sufficiency of Mr Polanski's reason for seeking the order for permission to give evidence by video link, it seems to me that the House of Lords' real concern in ***Polanski*** was not the intrinsic validity or adequacy of the reason put forward by him, but whether, as Lord Nicholls expressed it (at para. [23]), in a passage relied on by Mrs Gibson-Henlin, that reason was "**as a matter of legal policy**...acceptable in principle or not" (emphasis mine). It was this issue of legal policy which divided the House.

[34] The question of prejudice, which was considered in both ***Polanski*** and ***Panton*** as a relevant factor in this context, has not, as Mr Manning pointed out, been raised at all by the 1st and 2nd respondents in their opposition to the appellant's application in this case. But, on the other hand, despite Mrs Gibson-Henlin's obviously well-made point that it does not follow automatically that, if the appellant does not present himself for cross-examination pursuant to Campbell J's order, his affidavit will be disregarded (see rule 30.1(5), which gives the court a discretion in the matter), it is clear that, by not attending in defiance of the order, he will run that risk. It seems to me that this can hardly be regarded as an unfounded fear, particularly given that there is no indication from the stance currently being taken by the 1st and 2nd respondents that they are likely to adopt an indulgent attitude in such a circumstance. On the question of prejudice to either party therefore, it seems to me that the balance is plainly in favour of making the order granting the permission which the appellant seeks.

[35] The other reason apparently given by Pusey J for refusing the application was that he could not be satisfied that adequate facilities could be put in place in time for the hearing, which was then scheduled to take place on 1 May 2012. It is a fact that, by the time the matter came before the judge on 27 April 2012 (somewhat inexplicably, since the application, which was clearly an urgent one, was filed on 29 March 2012, almost a month before), the hearing set for 1 May 2012 was then only a matter of days away. However, the making of suitable arrangements was in my view plainly a matter for the appellant to secure and for the court to assess at the actual hearing on 1 May 2012. Even if on that date the arrangements in place for effective cross-examination were deemed by the court to be inadequate or unsuitable, it is not clear to me why even at that stage their improvement could not have been facilitated by a short adjournment for that explicit purpose.

[36] I have not in all of this lost sight of Mrs Gibson-Henlin's powerful submission that what Pusey J was being asked to do in this case was to vary Campbell J's order pursuant to rule 26.1(7) and that in these circumstances he needed to show, as this court held in ***Harley v Harley***, "some change of circumstances or...that a judge who made the earlier order had been misled" (per Harris JA, at para. [41]).

[37] However, it seems to me to be clear that, although the application before Pusey J was in point of fact described as an application to vary Campbell J's earlier order that the appellant should attend for cross-examination on 1 May 2012, the question of doing so by way of video link did not arise at all before Campbell J. So in point of fact, the application before Pusey J was not so much an application to vary the earlier order,

which had made no provision on the issue, but to introduce an element which had not previously been considered. As part of the court's general powers of management (as to which, see, for example, rule 26.1(2)(o), by which the court may "hold a hearing and receive evidence by telephone or use any other method of direct oral communication"), I would have thought that it was plainly competent for Pusey J to have considered the application for permission to give evidence by video link. In any event, I would be prepared to hold that, even if it were necessary for me to approach the matter in this way, which I do not, the order for cross-examination having been made by Campbell J on 13 March 2012 after an oral application made without notice, the fact that the appellant would be prejudiced by the order in the way he described was a sufficient change of circumstances to justify the granting of the order by Pusey J.

[38] Neither have I lost sight of the very important consideration that this is an appeal from the exercise of a discretion by a judge acting within his jurisdiction, and that in such circumstances, as Mrs Gibson-Henlin correctly submitted, this court is not entitled to exercise an independent discretion, unless on all the evidence before him the judge could not have come to his decision. As Lord Fraser of Tullybelton observed elegantly in ***G v G*** [1985] 2 All ER 225, 228 -

> "... the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

[39] In the instant case, for all the reasons which I have attempted to state in the foregoing paragraphs, I consider that the appellant has made good his challenge to Pusey J's decision, on the basis that this is a case in which the judge has exceeded the generous ambit within which reasonable disagreement is possible. Naturally, as is often the case in matters such as these, some of the appellant's grounds of appeal may be stronger than others (for instance, the suggestion that more detailed reasons from his attorney as to the undesirability of his leaving the USA at this time might have involved a breach of his legal professional privilege, in respect of which I would be inclined to agree with Mrs Gibson-Henlin's comment that the appellant "cannot prevent his attorney from revealing facts necessary to prove his case and then complain when the matter is not in his favour"). But in the end, resolution of this matter comes back, it seems to me, to the overriding consideration of what would best serve the interests of justice in all the circumstances. In this regard, I am content to leave the last word to Baroness Hale, who made this important point towards the end of her contribution in ***Polanski*** (at para. [80]):

> "New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone."

[40] I will accordingly make the following orders:

1) The appeal is allowed. The order of Pusey J dated 23 April 2012 refusing the appellant's application filed on 29 March 2012, for an order that he be

cross-examined by live video link instead of by attending court, is set aside.

2) It is hereby ordered that at the further hearing of the appellant's application for freezing orders fixed for 30 May 2012, and any further hearing thereof, the appellant shall have leave to be cross-examined by way of a live video link, instead of by attending court, pursuant to rule 29.3 of the CPR and in accordance with such terms and directions as the court below shall order.

[41] In the draft of my order circulated to the parties by way of electronic mail on 18 May 2012, I had proposed that, in keeping with the general rule (CPR rule 64.6(1)), the appellant should have the costs of the appeal, to be agreed or taxed. However, in a letter dated 21 May 2012, Mrs Gibson-Henlin indicated that the respondents wished to be heard on costs and, in a letter of even date, Mr Manning very properly agreed to my giving further consideration to the question of costs. I might only add that I would, in any event, have felt obliged to permit the respondent to address the matter, not only from the standpoint of general principle, but especially in the light of the Privy Council's recent reminder in ***Sans Souci Limited v VRL Services Limited*** [2012] UKPC 6, para. 23, to which Mrs Gibson-Henlin helpfully referred me, that "[i]t is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard".

[42] Accordingly, pursuant to a timetable agreed between the parties, written submissions on costs were received from Mrs Gibson-Henlin on 30 May 2012 and from Messrs Manning and Daley on 4 June 2012. However, before turning to those submissions, I should say a brief word by way of background on this issue. This appeal first came before me on 26 April 2012, when, with the consent of the parties, I gave directions for the filing of written submissions on both sides. I then indicated that, in accordance with the general rule governing procedural appeals stated in rule 2.4(3) of the Court of Appeal Rules 2002 ('the CAR'), I proposed to consider the matter on paper, subject to either party requesting that I conduct an oral hearing. By a letter dated 2 May 2012, addressed to the Registrar, the appellant's attorneys-at-law requested an oral hearing. In a letter dated 3 May 2012, also addressed to the Registrar, the respondents' attorney-at-law, while not appearing to resist the request for an oral hearing, nevertheless pointed out the urgency of the matter, suggesting by implication that an oral hearing might delay its resolution. This hearing duly took place on 14 May 2012, at which time I heard further submissions from counsel on both sides.

[43] Mrs Gibson-Henlin does not contend that an order for costs should not be made in the appellant's favour. However, she submitted, the court should order that the costs of the appeal be limited to the costs of the paper application, thereby excluding any costs attributable to the oral hearing. This course was justified, it was submitted, by the fact that "the oral hearing served no useful purpose", in that counsel for the appellant had "simply repeated" what had already been stated in his written submissions and had cited no new authorities. In the circumstances, the only effect of the request for an oral hearing had been

to delay the proceedings unnecessarily. Notwithstanding the general rule that a successful party should have his costs, rule 64.6 of the CPR recognised that the court could in its discretion depart from that rule in an appropriate case.

[44] Mr Manning challenged the factual bases of the Mrs Gibson-Henlin's submissions, pointing out that, at the oral hearing, he had done more than "simply repeat" his written submissions, and had used the opportunity to reply to and distinguish several authorities cited by Mrs Gibson-Henlin herself during the course of that hearing. In any event, it was submitted, the purpose of an oral hearing is not for either side to put forward new authorities or material, but to allow the parties to utilise the material before the court "in the best possible light to advance one's case". Finally, it was submitted, the court itself having directed that either party could request an oral hearing, the appellant ought not to be penalised for having availed himself of that opportunity.

[45] By virtue of rule 1.18 of the CAR, Part 64 of the CPR applies to the award and quantification of the costs of an appeal. Rule 64.6(1) of the CPR states the general rule as follows:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

[46] However, the court may order a successful party to pay costs or make no order as to costs (Rule 64.6(2)) and, in deciding who should pay costs in a particular case, "the court must have regard to all the circumstances" (rule 64.6(3)). In so doing, rule 64.6(4) mandates the court to have regard to several factors, including "the conduct of the parties

both before and during the proceedings" (64.6(4)(a)); "whether a party has succeeded on a particular issue, even if that party has not been successful in the whole of the proceedings" (64.6(4)(b)); and "the manner in which a party has pursued...that party's case" (64.6(4)(e)(i)).

[47] It is clear from the rules, as the parties accept, that the court enjoys a wide discretion as to the award of costs, though naturally subject to the important consideration of general principle that the discretion must be exercised judicially. The starting point under rule 64.6 is that costs should normally be awarded to the successful party against the unsuccessful party, "although there may be other factors which require some deviation from a simple application of that rule" ('A Practical Approach to Civil Procedure', 10th edn, by Stuart Sime, para. 43.19).

[48] Of the factors set out in rule 64.6(4), Mrs Gibson-Henlin's submissions invite particular attention to the question whether the conduct of the appellant in requesting an oral hearing in the circumstances of this case was unreasonable or, put differently, the manner in which the appellant pursued the appeal can be said to have been unreasonable. In this regard, it is relevant to bear in mind, I think, that the appellant's request for an oral hearing was made expressly pursuant to my invitation (pursuant to rule 2.4(5) of the CAR) to the parties to do so if they wished. In these circumstances, I would ordinarily approach the task of, in effect, second-guessing counsel's judgment in opting for a course clearly offered to him (or her) by the court with considerable diffidence, given the range of factors which must inevitably inform the way in which a case is ultimately presented by counsel. I would therefore

consider it to be for the respondents, as the persons contending for a departure from the general rule as to costs, to demonstrate why this case calls for a different approach.

[49] Mrs Gibson-Henlin's main point in this regard was that the oral hearing served no useful purpose, because the appellant added nothing, either by way of submission or citation of authority, to what had already been said in his written submissions. Even without revisiting the oral submissions in any detail, I cannot myself be so dismissive of Mr Manning's – or, indeed, of Mrs Gibson-Henlin's - efforts at the oral hearing. Both counsel, quite properly in my view, took the opportunity to restate their respective clients' cases in their own way and I certainly found the exercise helpful in clarifying my own thoughts. By that means, an early decision on the appeal, which both sides desired and the matter plainly demanded, was also facilitated.

[50] I am accordingly not persuaded that there is anything in this matter to require a departure, even in the limited manner for which Mrs Gibson-Henlin contends, from the general rule that costs should follow the event. My order is therefore that the appellant should have the costs of the appeal, to be agreed or taxed.