IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 221

Suit No 580 of 2016
(Summons No 1655 of 2018)

Between

Anil Singh Gurm

… *Plaintiff*

And

(1) J S Yeh & Co
(2) Yasmin binte Abdullah

… *Defendants*

GROUNDS OF DECISION

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See Kee Oon J:

1 If a witness located overseas does not wish to attend court to give oral evidence in person because he fears prosecution in Singapore, is the fear of prosecution a sufficient reason for the court to permit that witness to give evidence by video link instead? This was the essential question before me in this summons, an application by the plaintiff for his intended witness to be permitted to testify by video link from Australia, where the witness resides.

2 After hearing submissions, I ruled that the fear of prosecution alone is not a sufficient reason for the court to dispense with having the witness attend in person to give oral evidence. I therefore refused the plaintiff's application. Such a witness is not *unable* to come to Singapore, but is merely *unwilling* to do so. Further, it would be contrary to public policy to permit the witness to avoid prosecution in Singapore but give evidence that would essentially exculpate himself of any potential charges through video-link evidence, all

while he remains beyond the reach of the law.

3 I note, however, that the foreign cases have not spoken with one voice on this particular question. This is the first occasion on which a Singapore court has been called to decide this question. It is also, to my mind, an important question upon which a decision of the Court of Appeal would be to the public advantage. I have therefore granted leave to appeal pursuant to the plaintiff's further application in Summons 3781 of 2018 ("Summons 3781"). These are my grounds.

Background Facts

4 The plaintiff is a Singapore citizen. He commenced the proceedings in Suit 580 of 2016 ("Suit 580") against the first defendant, a firm of solicitors, and the second defendant, a solicitor in working in that firm. He alleges that the defendants had acted negligently in advising him on the purchase of a property at No 62 Crowhurst Drive ("the Property") in Singapore.[1]

5 The plaintiff had agreed to buy the Property as the nominee of his cousin, Mr Tejinder Singh Sekhon ("Mr Tejinder"), an Australian national, in 2006 ("the transaction"). Mr Tejinder was unable to purchase the Property in his own name as he was a foreign national at the time. Section 3 of the Residential Property Act (Cap 274, 2009 Rev Ed) ("RPA") prohibits the acquisition by foreign nationals of residential property such as the Property in Singapore unless approval is obtained from the Land Dealings Approval Unit ("LDAU"). Mr Tejinder was unable to obtain the necessary approval. Mr Tejinder approached the plaintiff to act as his nominee in the transaction.[2]

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1 Anil Singh Gurm's AEIC at para 3.

2 Anil Singh Gurm's AEIC at para 27; Tejinder Singh Sekhon's AEIC at para 28.

The plaintiff agreed to do so and bought the Property in his own name.[3] It was understood between the plaintiff and Mr Tejinder that Mr Tejinder was the beneficial owner of the Property, and would pay all costs and outlays incurred in purchasing the Property. Mr Tejinder bore those costs, and moved into the Property.[4] He resided at the Property from 2007 to 2011. The Property was sold in 2011 because Mr Tejinder had decided to move back to Australia.[5]

6 The plaintiff was charged in January 2015 for committing an offence under s 23 of the RPA by purchasing the Property as a nominee for a foreign person, Mr Tejinder, with the intention to hold the Property on trust for Mr Tejinder.[6]

7 The plaintiff commenced Suit 580 in June 2016 against the defendants for negligently advising him as to the legality of purchasing the Property as a nominee for a foreign national. The plaintiff wishes to call Mr Tejinder to give evidence as a witness in this action. Mr Tejinder, however, is unwilling to come to Singapore to give evidence in person out of fear of prosecution for his role in the transaction I have described above. The plaintiff therefore applied for Mr Tejinder to give evidence by video link in Summons 1655 of 2018 ("Summons 1655").

The parties' cases

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3 Anil Singh Gurm's AEIC at paras 34 to 35; Tejinder Singh Sekhon's AEIC at para 34.

4 Tejinder Singh Sekhon's AEIC at para 49.

5 Tejinder Singh Sekhon's AEIC at para 51.

6 Anil Singh Gurm's AEIC at ASG-49.

The plaintiff's case

8 The plaintiff argued that Summons 1655 should be allowed for five main reasons. First, Mr Tejinder is unable to come to Singapore. Mr Tejinder has been advised that there is a real and genuine risk that he will be prosecuted should he return to Singapore. A well-founded fear of prosecution has been accepted by foreign courts to be a legitimate reason for allowing evidence to be given by video link.

9 Second, there are suitable technical facilities available for Mr Tejinder to give evidence by video link from Australia, without hampering the defendant's cross-examination of Mr Tejinder.

10 Third, the plaintiff would be prejudiced should Summons 1655 be refused. Mr Tejinder is a key witness for the plaintiff's case, as he was the main point of contact with the defendants at the material time.

11 Fourth, the defendants would suffer no prejudice if Summons 1655 is allowed. The defendants would not be taken by surprise by the evidence Mr Tejinder will give by video link. This was because Mr Tejinder had affirmed an Affidavit of Evidence-in-Chief ("AEIC"), which had been available to the Defendants for almost five months. To the contrary, the defendants might instead be prejudiced if Summons 1655 is *not* allowed. This was because the court might still decide to admit Mr Tejinder's AEIC without the defendants being given the opportunity to cross-examine him.

12 Fifth, the plaintiff insisted that no collateral purpose was being pursued in Summons 1655. The defendants' contention that Mr Tejinder's evidence was

being obtained to be used in ongoing criminal proceedings was speculative and baseless. The evidence Mr Tejinder would give by video link would be inadmissible in the criminal proceedings anyway.

The defendants' case

13 The defendants argued that Summons 1655 should be dismissed for five main reasons. First, the defendants submitted that there was no principled basis upon which the court could grant the application, as the plaintiff had not offered any sound reason why Mr Tejinder could not give his evidence in Singapore. Mr Tejinder was not unable to come. He was merely unwilling to do so. Moreover, his unwillingness to come was founded on a speculative and unsubstantiated fear that he might possibly be charged should he return to Singapore. But the plaintiff had offered no basis for this fear.

14 Second, the court would be acting contrary to judicial policy and public policy by permitting Mr Tejinder to avoid criminal prosecution and the reach of the law in Singapore. This was especially egregious because Mr Tejinder's evidence would in effect serve to exculpate himself for the very same offence he sought to avoid being charged for in Singapore.

15 Third, the court would be permitting an abuse of its process in allowing the plaintiff to rely on Mr Tejinder's evidence in the criminal proceedings, when the plaintiff would not otherwise have been able to do so.

16 Fourth, the plaintiff would not be unfairly prejudiced if Summons 1655 was dismissed. Mr Tejinder's evidence was neither material nor necessary to resolving the key issue in Suit 580, which concerns the exact nature of the advice the defendants gave to the plaintiff concerning the purchase of the Property. Mr Tejinder could offer no relevant evidence on that question.

17 Fifth, the defendants would be unfairly prejudiced if Summons 1655 was allowed. This was because the defendants' lawyers and the court would be denied the crucial advantages of assessing Mr Tejinder's evidence in person, in particular in its appreciation of Mr Tejinder's demeanour in assessing his credibility. The defendants' lawyers would also be disadvantaged in their cross-examination of Mr Tejinder because of the degree of detachment between the court and the witness that comes about when evidence is given by video link.

Issues to be determined

18 The issue to be determined in this application was whether Mr Tejinder should be allowed to give evidence by video link from Australia. The essential underlying question, however, was the one I have identified above – whether Mr Tejinder's fear of prosecution is a sufficient reason for the court to find that in all the circumstances video-link evidence should be allowed.

The Law

19 The court is empowered by s 62A of the Evidence Act (Cap 97, 1997 Rev Ed) to allow for evidence to be given by video link. Section 62A is an important provision, and I set it out the relevant sub-sections here:

> **Evidence through live video or live television links**
>
> **62A. –** (1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if –
>
> (a) the witness is below the age of 16 years;
>
> (b) it is expressly agreed between the parties to the proceedings that evidence may be so given;
>
> (c) the witness is outside Singapore; or
>
> (d) the court is satisfied that it is expedient in the interests of justice to do so.

> (2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following:
>
> (a) the reasons for the witness being unable to give evidence in Singapore;
>
> (b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and
>
> (c) whether any party to the proceedings would be unfairly prejudiced.

20 I note at the outset that the defendants did not challenge the adequacy or suitability of the administrative and technical facilities the plaintiff was prepared to arrange for Mr Tejinder to give evidence by video link. I also did not find any reason to doubt that those facilities would have been adequate had I allowed the summons. I therefore do not need to speak further about s 62A(2)(b) of the Evidence Act.

21 Instead, the parties focussed their arguments on the other two limbs of s 62A(2) of the Evidence Act. Further, bearing in mind that those limbs are not exhaustive of the considerations the court must examine, the parties also made substantial submissions on the public policy dimension to allowing video-link evidence in this case. For convenience and analytical clarity, I have decided to conduct the analysis by examining the following sub-issues:

(a) Was Mr Tejinder unable to give evidence in Singapore?

(b) Would it be contrary to Singapore's public policy if a witness is allowed to give video-link evidence because of a fear of prosecution should he testify in person in Singapore?

(c) Which of the parties would be prejudiced if Summons 1655 was not allowed?

The present case

Was Mr Tejinder unable to give evidence in Singapore?

22 The core contested issue between the parties was whether Mr Tejinder was "unable" to give evidence in Singapore for purposes of s 62A of the Evidence Act. The plaintiff attempted to persuade me that a wide interpretation should be given to the word "unable". On the plaintiff's reading, the word "unable" should encompass the situation where the witness is physically able to attend but chooses not to because of a fear of prosecution upon his return to Singapore.

23 On the other hand, the defendants favoured a strict reading of the word, insisting that the plain meaning of the word "unable" quite simply means physical incapacity, for example due to illness, or inability caused by reasons other than of the witness's own doing. A voluntary choice not to attend, even if founded on a genuine fear of prosecution, is not an *inability* to attend.

24 I preferred the defendants' interpretation of the word "unable". The plain meaning of the word suggests a physical incapacity to attend, or an inability to attend caused by reasons other than of the witness's own doing. This meaning was not disturbed by any evidence as to parliamentary intention or by contrary case authority. Neither party advanced arguments on the parliamentary intention behind the statutory wording. The plaintiff also candidly admitted that there are no local cases interpreting this particular provision of the Evidence Act. The general principle is that witnesses in civil proceedings should give their evidence orally and in person in open court: *Sonica Industries Ltd v Fu Yu*

Manufacturing Ltd [1999] 3 SLR(R) 119 at [8]; *Kim Gwang Seok v Public Prosecutor* [2012] 4 SLR 821 at [29]. Evidence being given by video link is therefore the exception rather than the norm. In these circumstances, I preferred the view that the word "unable" cannot be interpreted so widely as to include a preference or choice not to attend in Singapore; to do so would transform the exception into the norm.

25 Both parties cited extensively from foreign cases to persuade me of their respective positions on this point. I now examine these cases to show how they do not detract from the conclusion I have reached above.

26 The defendants relied on Hong Kong case law, in particular a trio of Hong Kong decisions, in support of their argument that inability to attend must be distinguished from unwillingness to attend. The first case was *Re Chow Kam Fai* [2004] 1 HKLRD 161 ("*Re Chow Kam Fai (CFI)*"). There, the Hong Kong Court of First Instance denied the respondent's request to give evidence by video link from Macau. The respondent was not suffering from any disability, infirmity, or ill-health: at [38]. Instead, he hoped to avoid returning to Hong Kong as he would be arrested under a warrant of arrest: at [33]. The court saw this as a conscious choice not to attend, and not a decision arising out of "physical impossibility" to attend: at [40]. In the circumstances, the court saw no reason to grant the application. The decision was not disturbed on appeal: see *Re Chow Kam Fai* [2004] 2 HKLRD 260 at [27].

27 The second decision was *Raj Kumar Mahajan v HCL Technologies (Hong Kong) Limited* [2010] HKEC 1419. The third defendant in that case applied to give evidence by way of video link from India, because he had to attend important meetings in India and elsewhere during the period of the trial, and because he had been advised that he was medically unfit to travel overseas

due to pre-existing medical conditions. The Hong Kong Court of First Instance denied the application, finding that the defendant's medical conditions were not serious enough to prevent him coming to Hong Kong on a flight lasting only 5.5 hours: at [50] and [58]-[60]. The decision was not disturbed on appeal: see *Raj Kumar Mahajan v HCL Technologies (Hong Kong) Ltd* [2010] HKCU 2187 at [17].

28 The third decision was *Daimler AG v Leiduck, Herbert Heinz Horst & others* [2013] HKCU 812. In this case, the Hong Kong Court of First Instance did allow the first defendant to give evidence by video link. The first defendant was severely ill, and it would have been life-threatening for him to travel to Hong Kong: see [17]-[23].

29 The plaintiff in the present case sought to distinguish these three authorities. The plaintiff pointed out that the witnesses in all three cases were also parties to the action, whereas Mr Tejinder was a non-compellable witness who was not a party to the action. Further, I also noted that the relevant procedural rules in Hong Kong do not contain any analogue to s 62A of the Evidence Act. I accept that these differences make those cases an inexact parallel to this one.

30 That said, I did not consider these distinguishing features to undermine the validity of the distinction I have drawn between "inability" and "unwillingness". Rather, the cases supported it. All three decisions recognised the common-sense distinction between a person who is unable to attend, and a person who desires not to attend. They did so even though there is no express requirement in the Hong Kong procedural rules, or in the Hong Kong law of evidence, that the question of inability to attend ought even to be considered. Instead, Practice Direction 29 at paragraph 5 indicated that the considerations a

Hong Kong judge should take into account in deciding whether to allow video-link evidence to be given include the "fair and efficient disposal of the proceedings, the saving of costs and reducing delay": *Re Chow Kam Fai (CFI)* at [27].

31 In contrast, I was mandated by s 62A(2)(a) to examine the question of the witness being "unable" to attend. The plaintiff cited the English High Court decision of *Bank of Credit and Commerce International SA v Rahim* [2005] EWHC 3550 at [8] for the proposition that the courts should ordinarily be more amenable to video-link evidence being allowed where the witness is not a party to the proceedings. I could not discern such a proposition from that judgment. In any event, s 62A(2)(a) does not distinguish between witnesses who are a party to the proceedings, and those who are not. Nor could I find a principled basis to make such a distinction. In the circumstances, I considered the distinction between "inability" and "unwillingness" to be rational and justified.

32 I turn now to the authorities cited by the plaintiff. The plaintiff placed great reliance on the decision of the UK House of Lords in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637 ("*Polanski*"). That case concerned a suit brought in England by the film director Roman Polanski against the publishing house Condé Nast Publications for defamation in respect of certain articles written in a magazine published by Condé Nast. Mr Polanski applied to give evidence by video link from France. This was because he had been convicted of an offence in the United States but absconded before serving his sentence, and he did not wish to enter the United Kingdom for fear of being arrested and then extradited to the United States to serve out his punishment. As a French citizen, he could not be extradited from France.

33 The House of Lords allowed the application by a bare majority of 3-2. The plaintiff relied on the reasons of the majority. In particular, he relied on the observation made by Lord Hope of Craighead that the desire to "avoid the normal processes of law in this country is not a ground for declining to allow him to remain abroad and give his evidence by [video link]": at [66]. He also relied on the observation of Baroness Hale of Richmond that allowing video-link evidence would not assist the witness's evasion of the law, because Mr Polanski "[would] escape [his just deserts] whether or not the order [was] made", as Mr Polanski would "continue to be outside the reach of the United States authorities in any event", and all that a refusal of the application would achieve would be to "deprive [Mr Polanski] of his right to take action to vindicate his civil rights in the courts of this country": at [69]. He also argued that the facts in the present case were not as controversial as those in *Polanski*; unlike Mr Polanski, who actually was a fugitive from the law, Mr Tejinder has not even been charged in any criminal proceedings in Singapore.

34 To my mind, the analyses undertaken by both the majority and the minority in *Polanski* are deeply founded on policy considerations, and I will discuss those considerations in the next section of this judgment. At this point, it suffices to note that the relevant English procedural rule, like the Hong Kong procedural rules, says nothing about the court having regard to the witness being unable to attend. The relevant rule applied in *Polanski* was rule 32.3 of the English Civil Procedure Rules. That rule provides that the court "may allow a witness to give evidence through a video link or by other means": see *Polanski* at [8]. The rule is supplemented by a Practice Direction. That Direction provides that when the use of video conferencing is being considered a judgment must be made on cost saving and on whether the use of video conferencing "will be

likely to be beneficial to the efficient, fair and economic disposal of the litigation". Nowhere is the court asked to address its mind to the question of the witness's ability to attend.

35 The regime in Singapore is quite different. Section 62A(2)(a) of the Evidence Act requires the court to examine whether the witness is "unable" to attend. Nothing in *Polanski* addressed the question of "inability". In particular, nothing in *Polanski* addressed the more relevant question for our purposes: whether "inability" is wide enough to accommodate mere "unwillingness". Indeed, all of the judgments given in *Polanski* recognised that Mr Polanski was merely unwilling to attend, not that he was unable to. The question the House of Lords faced was therefore whether unwillingness to attend for fear of arrest and prosecution was sufficient to allow the application for video-link evidence. As Lord Nicholls of Birkenhead, who was part of the majority, summarised it, the question was: "[a] fugitive from justice is *unwilling* to come to this country to give evidence in civil proceedings properly brought by or against him. Can that be a sufficient reason for making a [video-link evidence] order?" (emphasis added): at [20]. This question, as I have just explained, was a different question from the one before me. I therefore did not find the reasoning of the majority in *Polanski* to be of assistance on this point.

36 The plaintiff also cited two local decisions which apparently endorse the majority's reasons in *Polanski*. The first was the decision of V K Rajah J in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 ("*Peters*"), specifically at [26]. The second was the Court of Appeal's decision in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428, specifically at [39]. I have examined both judgments. Neither assisted the plaintiff. Both these judgments concern the use of video-link evidence as a factor in the *forum non conveniens* analysis, *ie* in deciding whether it is

Singapore or some other jurisdiction that is the more appropriate jurisdiction for a trial. Video-link evidence is discussed as a factor reducing the significance of geographical proximity and the physical presence of foreign witnesses in court. Extracts from *Polanski* are cited, but only for the observations made by the House of Lords that improvements in technology have allowed evidence to be given by video link as naturally and as freely as if they were given by a witness present in the courtroom, and that the use of video-link evidence could be efficient and fair and contribute to the economic disposal of the litigation. It was clear that none of these observations has to do with the question before me, which was whether the court should allow evidence to be given by video link in the first place. Instead, the observations proceeded on the assumption that video-link facilities were available, and evidence *would be* allowed to be given by video link, and therefore the absence of the physical presence of witnesses was now a less weighty factor in the *forum non conveniens* analysis.

37 I note that the plaintiff also cited an extract from *Peters* at [27] which seemingly suggests that only a low bar applies before the court will permit evidence to be given by video link. I set out this extract in full:

> "If sufficient reason is given why the actual physical presence of foreign witnesses cannot be effected, a court should lean in favour of permitting video-linked evidence in lieu of the normal rule of physical testimony. Sufficient reason ought to be given a relatively low threshold to overcome and should be assessed with a liberal and pragmatic latitude. If a witness is not normally resident within a jurisdiction, that may itself afford a sufficient reason with a view to minimising costs."

Quite apart from the fact that these observations were made in respect of a *forum non conveniens* analysis, I note that the extract itself does not provide the answer as to what would be a "sufficient reason" to permit video-link evidence to be given. I do not consider that Rajah J's observations were to the effect that the threshold is so low that unwillingness to attend is sufficient to permit video-link

evidence to be given. Further, Rajah J was not called upon to examine the specific considerations a court must look at pursuant to s 62A of the Evidence Act, in particular the consideration whether the witness is "unable" to attend under s 62A(2)(a) of the Evidence Act; and understandably so, because s 62A of the Evidence Act was not raised in the dispute in *Peters*. This particular question, however, was before me, and my analysis of the statute and the cases above shows that an inability to give evidence must be distinguished from unwillingness to give evidence.

38 This brings us back to the essential distinction between a witness who is "unable" to attend, and a witness who is merely "unwilling to attend". To my mind, the fact that Mr Tejinder was merely "unwilling" to give evidence, and was not "unable" to, was a weighty factor that pointed against allowing the application. Mr Tejinder's unwillingness to travel to Singapore was founded on his fear of prosecution for an offence under the RPA should he return. I accepted that there was some risk that this might occur, given that the plaintiff has been charged and is facing trial in respect of the same property purchase which involved Mr Tejinder as the beneficial owner of the property. But I consider that these reasons do not have any bearing on the specific enquiry at hand, which was focused on Mr Tejinder's *inability* to attend in Singapore to give his evidence, in contrast to his professed *unwillingness* to travel for fear of possible prosecution. I therefore held that on this factor alone I would dismiss the application.

Public Policy

39 Should I be wrong on my interpretation of the word "unable", or be found to have placed too much weight on Mr Tejinder's unwillingness to travel as a factor in the analysis, I am also of the view that it would be contrary to

public policy to permit Mr Tejinder to avoid prosecution in Singapore and seek in effect to exculpate himself of any potential charge(s) through his video-link evidence while he remains beyond the reach of the law.

40 Considerations of public policy are not explicitly indicated as a factor to be considered in the analysis under s 62A(2) of the Evidence Act. But questions of public policy inevitably arise in a case such as this and therefore form part of the circumstances the court must consider. In my view, it would be contrary to public policy to allow the application.

41 I first consider the public policy considerations raised by the plaintiff. The plaintiff relied on the reasoning of the majority in *Polanski*. Lord Nicholls, Lord Hope and Lady Hale each delivered a speech. I summarise the key public policy considerations they identified in favour of allowing Mr Polanski's application for his evidence to be given by video link. First, fugitives from justice are not precluded from enforcing their civil rights through the courts. English law knows no principle of fugitive disentitlement, and denying the application is to deny Mr Polanski access to justice: Lord Nicholls at [24]-[25] and [31]; Lord Hope at [66]. Second, allowing the application for video-link evidence will not assist the fugitive's evasion of justice. Mr Polanski would not have returned to England whether or not the application was allowed. Allowing or denying the application would thus not alter Mr Polanski's status as a fugitive; granting the order would not allow him to escape from the normal processes of the law, nor would declining to grant the order do anything to assist them. Mr Polanski was already beyond the reach of those processes: Lord Nicholls at [28]; Lord Hope at [65]; Lady Hale at [69].

42 Let me examine these considerations in turn. The first consideration loses much of its force in the present context. Unlike Mr Polanski, Mr Tejinder

was neither a fugitive from justice nor had he initiated civil proceedings in Singapore. There was therefore no question of disentitling him from enforcing his civil rights, nor of denying him access to justice. The argument might be made that it was the plaintiff who was disentitled from enforcing his civil rights and denied access to justice. But that argument is obviously flawed. No party in civil proceedings is entitled to call upon whatever witness they wish, by whatever means of giving evidence they desire. Mr Tejinder was and is not compellable. The key public policy consideration that impelled the majority in *Polanski* to allow Mr Polanski to give evidence by video link does not apply to Mr Tejinder, as it was not *his* rights which he sought to enforce. So if Mr Tejinder was unwilling to attend in Singapore to give evidence, it would be up to the plaintiff to make as best a case he could out of the evidence available to him.

43 As for the second consideration, it was apparent to me that the reasoning of the majority in *Polanski* was founded on the assumption that a fugitive such as Mr Polanski would not return whatever the result of the application. I am not convinced that that assumption is necessarily an unshakeable one. The assumption might have been true of Mr Polanski, who had been convicted of a serious offence in the United States, and for whom the pursuit of his civil rights might have been less significant as compared to the prospect of serving out an onerous sentence if he had returned to the United Kingdom and been extradited to the United States. But it might not be true of other offenders. A fugitive from justice who absconds and fails to serve a comparatively light sentence, but stands to lose the bulk of his personal wealth if he does not pursue his civil action, might take a different approach. I was therefore in some doubt as to the correctness of the assumption adopted by the majority. And it therefore follows that I was also in some doubt as to the soundness of the reasoning based upon

that assumption. I was certainly in doubt as to whether a general principle should have been extracted from the facts of *Polanski* that an application for evidence to be given by video link made by fugitives from justice should generally be allowed because allowing or refusing it would make no difference to the offender's evasion of the normal processes of the law.

44 Instead, I would align myself with the reasons of the minority in *Polanski.* Lord Slynn of Hadley and Lord Carswell both stated that it would be contrary to public or judicial policy to grant an application for video-link evidence where the sole reason given for the witness not attending was his professed desire to avoid the risk or likelihood of arrest and extradition. Lord Slynn thought that the policy consideration of satisfying the criminal sentence was by no means less important than the desirability of permitting Mr Polanski to sue in libel: at [56]. Lord Carswell opined that permitting a fugitive to give evidence by video link so that he could stay out of the jurisdiction and avoid arrest would affront the public conscience and bring the administration of justice into disrepute: at [91]. Simply put, the court should not assist the fugitive from avoiding the consequences of his criminal act: Lord Carswell at [93]. It bears noting that the views of the minority were preferred by Griffiths J, who was in the majority in the Australian Federal Court decision in *Seymour and another v Commissioner of Taxation* [2016] FCAFC 18 (see [72]). And it also bears noting that a unanimous Court of Appeal of England and Wales in *Polanski v Condé Nast Publications* [2004] 1 WLR 387 dismissed the application as well, largely for the same reasons as the minority in *Polanski*, before being reversed on appeal. The weight of authority was not overwhelmingly in the plaintiff's favour.

45 The point might be made, of course, that the reasons of the minority in *Polanski* do not apply with the same force to the present case. Unlike

Mr Polanski, Mr Tejinder was not a fugitive from justice. The course of justice would not be obstructed or hampered when the course has not even begun to flow against Mr Tejinder, who has not even been investigated, let alone charged with a crime. Mr Tejinder might be beyond the grasp of the law, but the law has not (or at least not yet) reached out for him.

46 I recognised the force of these arguments. But I did not think that they undermined the validity of the core public policy consideration identified by the minority of *Polanski*, which is that a witness cannot raise as a valid reason for not attending in person, and instead for giving evidence by video link, his professed desire to avoid the normal processes of the law. The processes of the law that might normally apply depend on the facts of each case. In the case of a convicted offender, such as Mr Polanski, the normal processes of the law would ordinarily entail his arrest and his being placed in jail to serve out his sentence. In the case of a person suspected to be an offender, the normal processes of the law would ordinarily entail his possible prosecution. It is only a possible prosecution because that person, and the court, both cannot know whether the Public Prosecutor will exercise his prosecutorial discretion to prefer a charge against him. Mr Tejinder fell into this latter category. He has not been charged with a crime. But he certainly thinks there is a real risk of him being so charged. And thus the only reason he has raised for not attending is his desire to avoid that risk of prosecution. To my mind, this cannot mean anything other than a desire to avoid the normal processes of the law, which, it must be recognised, operate to achieve the ends of justice.

47 I considered that it would be an affront to the public conscience, and bring the administration of justice into disrepute, if the court endorses actions taken by possible perpetrators of crimes to avoid being brought to justice. As I have just explained, the court cannot know whether the witness is *actually* an

offender; that is a legal determination which depends on the witness being convicted by a court. But where the witness raises his desire not to be prosecuted as his sole ground for not attending, I considered that the court would be assisting him in that desire, which is essentially a desire to evade justice, if it allowed an application for him to give evidence from outside the country by video link and thus remain beyond the reach of Singapore law enforcement. This cannot be right. The public policy considerations therefore militated against allowing the application for evidence to be given by video link.

48 I add also that in refusing the application, I considered that the court ought not to countenance allowing Mr Tejinder to give potentially exculpatory evidence in respect of any criminal charges that might be preferred against him, and thus permit him to circumvent various statutory prohibitions on video link evidence being given from out of the country in criminal proceedings. In this regard, it first bears noting that the Court of Appeal has held in *Kim Gwang Seok* at [24] that video link evidence can only be given in criminal proceedings if the witness is in Singapore. That is the effect of s 62A of the Evidence Act, which permits video-link evidence in any proceedings "other than proceedings in a criminal matter", and of s 364A of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

49 In this case, I fully recognised that Mr Tejinder is not facing any pending investigation and has not been charged with an offence. Strictly speaking, he has no need to exculpate himself, and it cannot be said that he will be virtually certain to face a criminal charge. But the entire basis upon which the application for evidence to be given by video link was mounted was that Mr Tejinder feared prosecution. The evidence that he intended to give by video link was to the effect that he had never been advised by his solicitors that the transaction in respect of the Property was illegal.[7] That evidence would potentially be relied

upon to exculpate him in an investigation which might otherwise result in charges brought under the RPA. He ought not to be permitted to rely on any such evidence, insofar as they form part of the public record or findings made by this court.

50 I considered that the public policy considerations weighed so heavily against allowing the application that I would also have refused the application on this basis alone, had I not already refused the application because of the plaintiff's inability to satisfy me that Mr Tejinder was unable to attend in Singapore to give his evidence. Given that these two factors weighed so strongly against the plaintiff, I did not see it necessary further to hold whether it would be the plaintiff or the defendants who would be unfairly prejudiced by a refusal of the application.

Addendum: Leave to Appeal

51 After I pronounced my decision in Summons 1655, the plaintiff applied for leave to appeal in Summons 3781. The plaintiff proceeded on all three of the established grounds for leave, arguing that there was (i) a *prima facie* error of law; (ii) a question of general principle to be decided for the first time, and (iii) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage. The defendants resisted on all three grounds.

52 The plaintiff sought to persuade me that I had made a *prima facie* error of law in my interpretation of the word "unable", essentially repeating the arguments he had made in Summons 1655. The defendants submitted that I had made no such error of law, simply because I had instead made a finding of fact

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[7] Plaintiff's submissions at para 40.

that Mr Tejinder was unable to come to Singapore, which was sufficient to dispose of this ground of the application. I was not persuaded that I had made a *prima facie* error of law in my interpretation of the word "unable" simply by giving it its plain meaning which was not contradicted by evidence of contrary parliamentary intention or by case law.

53 I accepted, however, that the thresholds for the other two grounds for leave to appeal were met. There has been no local decision interpreting s 62A(2)(a) of the Evidence Act. There has also been no local decision examining the public policy considerations raised by an application such as this, where the witness seeks to give evidence by video link so as to avoid entering Singapore and thus avoid the normal processes of the law, and ultimately, evade justice. Conversely, those policy considerations have been the subject of a closely divided decision at the highest level of the English courts, reversing the decision of a unanimous Court of Appeal, itself reversing the decision of the High Court. Moreover, the considerations have been examined at varying levels by Australian and Hong Kong courts. In my view, this case does raise a question of general principle decided for the first time, and also a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage. I have therefore granted leave to appeal against my decision in Summons 1655.

Conclusion

54 For the reasons above, I dismissed Summons 1655 with costs to the defendants, fixed at $6,000 inclusive of disbursements. The witness whose evidence was sought to be taken by way of video link was not *unable* to come, but was merely *unwilling* to come. This was a sufficient reason to refuse the application. The witness's unwillingness to attend personally was also based on

a reason which a court of justice could not condone, namely a desire to avoid prosecution in Singapore and thus to evade justice. Public policy considerations therefore also formed a separate reason not to allow the application.

55 This case does, however, raise an interesting question of general principle, and a question of importance upon which a decision of the Court of Appeal would be to the public advantage. I have therefore granted leave to appeal against my decision.

See Kee Oon
Judge

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for the plaintiff;
Chandra Mohan and Ang Tze Phern (Rajah & Tann)
for the first and second defendants.