IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 05

Civil Appeal No 164 of 2018

Between

Anil Singh Gurm

… *Appellant*

And

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

… *Respondents*

GROUNDS OF DECISION

[Evidence] – [Witnesses] – [Attendance] – [Video link]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **3**

BACKGROUND TO THE DISPUTE 3

PROCEDURAL HISTORY 6

THE DECISION BELOW **8**

THE PARTIES' CASES ON APPEAL **10**

THE APPELLANT'S CASE 10

THE RESPONDENTS' CASE 11

DISCUSSION **12**

THE BROAD ISSUE 12

SECTION 62A OF THE EA 13

THE SUB-ISSUES ARISING FROM THE BROAD ISSUE 14

Section 62A(2)(a) of the EA does not cover situations where a witness is able but unwilling to attend proceedings in Singapore *15*

Mr Sekhon was not unable to give evidence in Singapore *21*

Overall, the circumstances of this case pointed in favour of granting leave *21*

(1) Mr Sekhon was not a party to Suit 580 and had no control of how it was conducted 23

(2) Mr Sekhon would not derive any tangible benefit from Suit 580, whether directly or indirectly 29

(3) The appellant had no control over Mr Sekhon who was not compellable 30

(4) Mr Sekhon was a witness who could give material evidence on critical factual issues in Suit 580 31

(5) The appellant would have been prejudiced if leave were refused while the respondents would have suffered no prejudice if leave were granted 33

(6) There was no evidence that Suit 580 was brought for any collateral purpose 38

CONCLUSION 39

THE LEAVE APPLICATION AND PUBLIC POLICY 40

Anil Singh Gurm
v
J S Yeh & Co and another

[2020] SGCA 05

Court of Appeal — Civil Appeal No 164 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
20 August 2019

7 February 2020

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 In *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 ("*Basil Anthony Herman*"), this court observed, at [24]–[26] that:

> … ***[E]very litigant has a general right to bring all evidence relevant to his or her case to the attention of the court. This general right is so fundamental that it requires no authority to be cited in support of it; in fact, to say that the right derives from some positive decision or rule is to understate its constitutive importance to the adversarial approach to fact-finding.*** The importance of the right is reflected in the fact that a litigant may pray in aid the machinery of the court to compel, on the pain of contempt, all persons who are in a position to give relevant evidence, to come forward and give it.
>
> The general right is, of course, subject to specific limits. … The adduction of relevant evidence must, as far as practicable, take place in accordance with the rules of procedure whose purpose

> is to ensure the *fair*, economical, swift and orderly resolution of a dispute. Finally, a litigant is prohibited from manipulating the court's machinery to further his ulterior or collateral motives in an abusive or oppressive manner.
>
> In striking the proper balance between the general right and the specific limits, ***a trial judge must not only be guided by the applicable rules and decisions, but must look beyond the mechanical application of these rules and decisions, and carefully assess the interests at stake in every case to ensure that a fair outcome is reached through the application of fair processes.*** It should always be borne in mind that grave consequences might flow from the wrongful exclusion of evidence (such as by shutting out a witness from testifying or preventing cross-examination). …
>
> [emphasis in original in italics; emphasis added in bold italics]

2 The litigant's right to bring all relevant evidence before the court is a right to physically adduce that evidence in court. Modern technology has been called in aid of litigants who for one reason or another have difficulty in bringing witnesses into the courtroom. One specific way that it has done so is to enable litigants to call witnesses to testify in judicial proceedings through live video link, thereby giving them and the court access to evidence that might otherwise be inadmissible or unavailable. That said, Singapore law does not grant litigants a *right* to use this technology in aid of their cases. Instead, s 62A of the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") requires the court to grant leave before a witness may testify in local civil proceedings via video link. This does not alter the default position that a witness must be physically before the court in order to testify. Nevertheless, and for reasons that we shall come to, s 62A of the EA provides the court with a broad discretion when determining whether to grant a witness leave to testify in local civil proceedings via video link.

3 This appeal arose out of an application by Mr Anil Singh Gurm, the plaintiff in Suit No 580 of 2016 ("Suit 580"), for leave pursuant to s 62A(1)(*c*) of the EA for an overseas witness, Mr Tejinder Singh Sekhon ("Mr Sekhon")

to testify in Suit 580 via video link ("the leave application"). The High Court Judge ("the Judge") dismissed the leave application. The Judge's grounds are found in *Anil Singh Gurm v J S Yeh & Co and another* [2018] SGHC 221 ("the GD"). Having heard the parties, we allowed the appeal and granted the appellant leave to adduce Mr Sekhon's testimony in Suit 580 via video link. We now set out the full grounds for our decision.

Facts

4 The appellant is a Singapore citizen and is resident here. The first respondent (and first defendant in Suit 580), J S Yeh & Co ("JSY"), is a local law firm. The second respondent (and second defendant in Suit 580), Ms Yasmin binte Abdullah ("Ms Yasmin"), is a solicitor and was employed by JSY at the material time. The appellant alleged that the respondents had been negligent in acting for him in the purchase of a local residential property.

Background to the dispute

5 In 2006, Mr Sekhon, who is the appellant's cousin, sought to purchase a house in Singapore ("the Property") for occupation by himself and his family. Being a foreigner, however, Mr Sekhon could not purchase the Property without the prior approval of the Land Dealings Approval Unit ("the LDU") pursuant to s 3 of the Residential Property Act (Cap 274, 2009 Rev Ed) ("the RPA"), which places restrictions on foreign nationals' ownership of local residential property. Mr Sekhon applied for permanent residency in Singapore in June 2006. Sometime during the period from July to August 2006, he engaged JSY to act as his solicitors in his application for the LDU's approval ("the LDU application") and his acquisition of the Property. During this period, he liaised directly with Ms Yasmin and a Ms Quah Kwee Suan ("Ms Quah") who was also a solicitor employed by JSY at the material time. Unfortunately, Mr Sekhon did

not obtain the necessary approval from the LDU and therefore could not purchase the Property in his own name.

6 In October 2006, Mr Sekhon approached the appellant and asked if the appellant would be willing to consider purchasing the Property as Mr Sekhon's "nominee". According to the appellant:

(a) he had agreed to consider Mr Sekhon's request on the condition that participating in such an arrangement would not expose him to any risk, legal or otherwise;

(b) consequently, Mr Sekhon sought Ms Yasmin's advice on the legality of the appellant holding the Property on his behalf, and Ms Yasmin had advised that this was an "acceptable" arrangement;

(c) Mr Sekhon then communicated Ms Yasmin's advice to the appellant, and the appellant agreed to act as Mr Sekhon's nominee;

(d) thereafter, both the appellant and Mr Sekhon met with Ms Yasmin in October or November 2006 and informed her that: (i) the appellant had agreed to purchase the Property on Mr Sekhon's behalf; and (ii) Mr Sekhon would make the mortgage payments, and would be a co-borrower or guarantor for the housing loan. At this meeting, Ms Yasmin confirmed to both men that the arrangement was acceptable and that JSY would handle the necessary paperwork.

7 The respondents disputed this version of events, and instead contended that:

(a) After the LDU application had been turned down, Mr Sekhon informed Ms Quah that the appellant would be purchasing the Property instead in his own name.

(b) At a subsequent meeting attended by the appellant and Mr Sekhon, Ms Yasmin told the appellant that it was unlawful for him to purchase and hold the Property on Mr Sekhon's behalf. Ms Yasmin also told the appellant that if he wished to purchase the Property, he must do so on the basis that he would be its legal and beneficial owner. She then sought and obtained the appellant's confirmation that he was purchasing the Property "in his personal and legal capacity".

8 A fresh option to purchase the Property was issued by the vendors in the appellant's favour in November 2006. Shortly afterwards, the appellant appointed JSY as his solicitors in the Property's acquisition. The appellant eventually acquired the Property in his own name with the transaction being completed in late December 2006. He claimed that both he and Mr Sekhon were unaware that it was unlawful for him to act as the latter's nominee in the purchase of the Property.

9 According to the appellant, the Property was sold in mid-2012 for about $5.5m. The proceeds of sale were used to discharge the mortgage and pay for other related outstanding expenses, with the balance, amounting to about $3m, being returned to Mr Sekhon who by then had left Singapore for Australia.

10 In December 2012, the Commercial Affairs Department of the Singapore Police Force ("CAD") commenced an investigation into the purchase of the Property and seized documents from the appellant's house. The appellant informed Mr Sekhon of this investigation, and the two men started

communicating on the steps that they should take to raise the necessary funds for the purposes of making restitution to the State. Both men hoped that the criminal investigation would be dropped after they had made full restitution to the State. They also discussed the commencement of legal proceedings against the respondents with the expectation that the respondents would indemnify them against any sum payable as restitution to the State. Mr Sekhon remitted about $2m to the appellant between May 2014 and March 2015 for this purpose. However, their relationship subsequently deteriorated as Mr Sekhon was unable to deliver on his promise to provide the appellant with sufficient funds to cover the amount that the appellant might have to pay the State under a confiscation of benefits order. The appellant has not received any further sums from Mr Sekhon.

11 In January 2015, the appellant was charged with an offence under s 23 of the RPA for his role in the purchase of the Property as a nominee/trustee of Mr Sekhon, a foreigner, with the intention of holding the Property on trust for the latter. He claimed trial to the charge. In July 2015, the Prosecution also informed the appellant that the proceeds from the sale of the Property (*ie*, $5,502,038.06) were liable to confiscation if the appellant were to be convicted on the charge.

Procedural history

12 As mentioned above, the appellant claimed trial to the charge. His criminal trial was originally scheduled to take place at the end of 2016. However, the appellant sought and obtained an adjournment of the criminal trial on the basis that it would be more expedient if his negligence claim against the respondents in Suit 580 was determined first. It appeared that his defence against the charge was that s 23 of the RPA required proof that he had purchased

the Property on Mr Sekhon's behalf without knowing that his conduct was unlawful, and that he had no knowledge that his conduct was unlawful because the respondents had advised him otherwise. The criminal trial was thus re-fixed to dates at the end of 2018. Those dates, however, were vacated due to the appellant's ill health. At the time of this appeal, the criminal trial had not been heard.

13 In the meantime, in June 2016, the appellant had commenced Suit 580 against the respondents, alleging that they had acted negligently as his solicitors for the transaction. He also alleged that the respondents' negligence had resulted in his being charged with a criminal offence under s 23 of the RPA, being liable to make restitution to the State, having to incur legal costs in defending himself in the criminal trial, and incurring loss of income as he could not seek or pursue employment due to the ongoing criminal trial. He therefore claimed:

(a) the sum of $5,502,038.06, being the proceeds of sale from the Property, and/or in the alternative, the sum liable for confiscation should he be found guilty under s 23A(4) of the RPA;

(b) the fine payable pursuant to s 23(4) of the RPA, should he be found guilty;

(c) his legal costs incurred in the criminal proceedings; and

(d) loss of income to be assessed.

14 Suit 580 was initially fixed for trial in July 2018 ("the July trial dates"). The parties were also directed to file and exchange their affidavits of evidence-in-chief by 14 March 2018. On 4 April 2018, the appellant filed the leave application to seek the court's leave for Mr Sekhon to testify in Suit 580 via

video link. The July trial dates were vacated at some point, and Suit 580 was re-fixed for trial before the Judge in September 2018. The Judge heard the leave application on 1 August 2018 and dismissed it on 6 August 2018. He granted the appellant leave to appeal against his decision on 31 August 2018 and ordered that the September trial dates be vacated.

The decision below

15 The Judge dismissed the leave application for two reasons. First, he held that Mr Sekhon's unwillingness to testify in person in Singapore was, in and of itself, an insufficient reason for leave to be granted under s 62A(2)(*a*) of the EA and was instead a weighty reason *not* to grant leave (GD at [38]). The Judge's starting point for this conclusion was the language of the section itself (GD at [24]). In the Judge's view, the concept of inability under s 62A(2)(*a*) only extended to situations where a witness was either: (i) physically incapable of attending local proceedings; or (ii) unable to attend local proceedings for reasons other than those caused by the witness's own doing (GD at [24]). The Judge was reluctant to adopt a broader interpretation of s 62A(2)(*a*) as he thought that doing so would impermissibly dilute the general rule that witnesses are to testify in person in court (GD at [24]). He also declined to place any reliance on the foreign authorities cited by the parties as the provisions which authorised the giving of evidence via video link in those jurisdictions did not expressly require those courts to consider the reasons why a witness was *unable* to testify in person (GD at [29] and [34]). He therefore held that this alone provided sufficient reason to dismiss the leave application.

16 Second, the Judge held that leave should be refused because granting leave would be tantamount to judicial endorsement of Mr Sekhon's attempt to avoid being brought to justice, which would in turn bring the administration of

justice into disrepute (GD at [39], [46]–[47]). He held that this was a question of policy that the court had to consider in deciding whether leave should be granted (GD at [40]). The Judge also found that Mr Sekhon would potentially rely on the evidence he intended to give in Suit 580 to exculpate himself in an investigation that might otherwise result in charges being brought against him under the RPA (GD at [49]). In coming to this conclusion, the Judge declined to adopt the reasoning of the majority in *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637 ("*Polanski (HL)*"). First, the Judge was unconvinced by the majority's view that preventing a litigant, who was unwilling to enter Singapore for fear of arrest, from testifying via video link would deny him access to justice. In the context of the present case, the Judge observed that the appellant would not be denied access to justice as he had no entitlement to call whatever witness he wished, to give evidence via whatever means he desired (GD at [42]). Second, the Judge doubted the assumption made by the majority in *Polanski (HL)* that the witness would not return to the jurisdiction, whatever the result of the application. On the contrary, he observed that a fugitive who faces a fairly light sentence and who has the bulk of his personal wealth in the jurisdiction might very well take a different approach (GD at [43]). The Judge thus preferred the view of the minority in *Polanski (HL)* which was essentially that a court should not assist a person to avoid the consequences of his criminal act (GD at [44]–[45]).

17 Given his finding that the appellant's application should be dismissed, and the strength of the reasons for doing so, the Judge found it unnecessary to decide whether either party would be prejudiced if the leave application were allowed or dismissed (GD at [50]).

The parties' cases on appeal

The appellant's case

18 First, the appellant submitted that the Judge was wrong to have denied granting leave on the basis that Mr Sekhon was unwilling rather than unable to attend proceedings in Singapore. This was because the Judge had adopted an overly restrictive and narrow meaning of the word "unable" in s 62A(2)(*a*) of the EA. The appellant contended that the word "unable" in s 62A(2)(*a*) should have been interpreted widely to include situations where a witness was unwilling to attend proceedings in Singapore for *bona fide* reasons. Additionally, the appellant relied on this court's decision in *Sonica Industries Ltd v Fu Yu Manufacturing Ltd* [1999] 3 SLR(R) 119 ("*Sonica Industries*") to submit that this court should adopt a low threshold in deciding whether leave should be granted. The appellant submitted that as a result of his erroneous interpretation of s 62A(2)(*a*), the Judge had placed undue emphasis on the question of whether Mr Sekhon was "unable" to testify in person in Suit 580. Consequently, he had failed to give sufficient weight to the prejudice that the appellant would suffer if Mr Sekhon was denied leave. Finally, the appellant also submitted that the Judge had failed to give sufficient weight to the fact that Mr Sekhon was a non-compellable witness since he was living overseas.

19 Second, the appellant submitted that the Judge was wrong to have denied leave on the basis that doing so would bring the administration of justice in Singapore into disrepute. The Judge should not have adopted the minority's position in *Polanski (HL)* as a general rule. Instead, the competing policy considerations outlined by the majority in *Polanski (HL)* should be weighed and balanced based on the facts of each case. Additionally, the appellant also submitted that the minority's concerns in *Polanski (HL)* relating to the

assistance of a fugitive in avoiding justice did not apply with the same vigour in this case. This was because Mr Sekhon was not a fugitive, had not been charged with any offence, was not the claimant in Suit 580, and was not in pursuit of any collateral purpose.

The respondents' case

20 The respondents made several submissions in support of the Judge's decision. Their first broad point was that the appellant had not provided satisfactory reasons why the court should grant leave. In their view, the proper administration of justice required witnesses to be physically present in open court to give their evidence. Although s 62A provided an exception to this general rule, there were insufficient reasons to justify a departure from that rule in this case since Mr Sekhon was merely unwilling to give evidence in person. Additionally, Mr Sekhon was not going to be an important witness in Suit 580, and his fear of prosecution was merely speculative. It was also material that they would be prejudiced if leave were granted because: (i) it would cause them to incur additional legal costs; and (ii) because the court would not be able to assess Mr Sekhon's credibility accurately if he were not physically present in court.

21 The second broad point was that the Judge was right to have denied Mr Sekhon leave as it would be contrary to public policy to allow him to testify via video link purely because of his self-professed desire to avoid the reach of Singapore law. If leave were granted, the court would essentially be facilitating Mr Sekhon's avoidance of the normal processes of the law. This was aggravated by the fact that his evidence would serve to exculpate him from the very offence that he was seeking to avoid prosecution for.

22 Third, the respondents contended that it would be permitting an abuse of process to grant leave as it would allow the appellant to potentially rely on Mr Sekhon's evidence in the criminal proceedings when he would otherwise not be able to do so. They pointed to the appellant's refusal to provide an undertaking that he would not rely on Mr Sekhon's evidence in the criminal proceedings. They also alleged that the appellant had deliberately caused the delay of the criminal trial so that Suit 580 would be heard first.

Discussion

The broad issue

23 Broadly put, the issue that arose for determination in this case was whether s 62A permitted the grant of leave to a witness in the position of Mr Sekhon. To reiterate in a summary form, the Judge held that leave should not be granted for Mr Sekhon to testify via video link because:

(a) he was merely unwilling, and not unable, to testify in person here; or

(b) doing so would be contrary to public policy as it would be tantamount to endorsing Mr Sekhon's attempt to avoid justice.

It was implicit in the Judge's decision that the only basis for allowing a witness who is outside Singapore to testify by video link would be that the witness falls within s 62A(1)(*c*) (*ie*, that he is outside the country) *and* is "unable to give evidence" here within the meaning of s 62A(2)(*a*). He did not consider whether the witness could still qualify for leave under the section even though he is not "unable" to come here.

Section 62A of the EA

24 At this juncture, it is convenient for us set out the relevant provisions of s 62A of the EA. We do so below, emphasising in bold italics the parts of the section that are particularly pertinent in this case:

> **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***.
>
> (3) The court may, in granting leave under subsection (1), make an order on all or any of the following matters:
>
> (*a*) the persons who may be present at the place where the witness is giving evidence;
>
> …
>
> (*h*) any other order the court considers necessary in the interests of justice.
>
> (4) The court may revoke, suspend or vary an order made under this section if —

> (*a*) the live video or live television link system stops working and it would cause unreasonable delay to wait until a working system becomes available;
>
> (*b*) it is necessary for the court to do so to comply with its duty to ensure that the proceedings are conducted fairly to the parties thereto;
>
> (*c*) it is necessary for the court to do so, so that the witness can identify a person or a thing or so that the witness can participate in or view a demonstration or an experiment;
>
> (*d*) it is necessary for the court to do so because part of the proceedings is being heard outside a courtroom; or
>
> (*e*) there has been a material change in the circumstances after the court has made an order.
>
> (5) The court shall not make an order under this section, or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly to the parties to the proceedings.
>
> …
>
> (8) Where a witness gives evidence in accordance with this section, he shall, for the purposes of this Act, be deemed to be giving evidence in the presence of the court.
>
> …
>
> [emphasis added in bold italics]

The sub-issues arising from the broad issue

25 For the purpose of our consideration, we broke down the main issue identified above into the following sub-issues:

(a) Whether s 62A(2)(*a*) of the EA can or should be interpreted to include situations where a witness is unwilling, rather than unable, to testify in Singapore.

(b) Whether Mr Sekhon was "unable" to attend proceedings in Singapore within the meaning of s 62A(2)(*a*).

(c) If Mr Sekhon was not unable to attend in Singapore, whether leave should nevertheless be granted.

We discuss those sub-issues in turn.

Section 62A(2)(a) of the EA does not cover situations where a witness is able but unwilling to attend proceedings in Singapore

26 In their submissions, both parties placed significant emphasis on the question of whether s 62A(2)(*a*) could and should be interpreted to include situations where a witness is able but unwilling to attend proceedings in Singapore.

27 Without clearly explaining why, the appellant submitted that s 62A(2)(*a*) could be interpreted this way, and that to interpret it in this way would be consistent with the purpose of the section.

28 In contrast, the respondents submitted that the word "unable" in s 62A(2)(*a*) could not be interpreted to include anything other than situations where a person cannot attend proceedings in Singapore due to reasons that are not of his own doing. In their view, holding otherwise would transform the rule that a witness must be physically present in Singapore to give evidence from being the general rule to becoming the exception. Flowing from this, a witness's unwillingness to attend proceedings in Singapore should not, *prima facie*, constitute a good or sufficient reason for the purpose of s 62A(2)(*a*), and such a reason would weigh against the granting of leave. Nevertheless, they did not contend that the mere fact of Mr Sekhon being able but unwilling to testify in Singapore was sufficient reason to deny him leave.

29 The principles of statutory interpretation are well established (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [54]; *Public Prosecutor v Lam Leng Hung and others* [2018] 1 SLR 659 at [67]; *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 at [58]–[59]). They are:

(a) First, the court should ascertain the possible interpretations of the text, having regard to both the ordinary meaning of the words and the context of the provision within the statute as a whole. In doing so, the court may be aided by the rules and canons of statutory interpretation. Those interpretations that do violence or go against all possible and reasonable interpretations of the provision's express wording should be excluded at this stage.

(b) Second, the court should ascertain the legislative purpose or object of the legislative provision in question.

(c) Finally, the court will compare the possible interpretations of the provision in question against the purpose of the relevant part of the statute. The interpretation that furthers the purpose of the written text would be preferred to the interpretation that does not.

30 In our view, the Judge was right to have concluded that the word "unable" was not reasonably capable of being interpreted to include situations where a witness was able but merely unwilling to testify in Singapore. The plain and ordinary meaning of the word "unable" implies a lack of choice on the witness's part. As such, the reason given by the witness for not travelling to Singapore must be one relating to circumstances outside his or her control.

31 That was not the end of the question, however. As we noted at the hearing, it was also possible to interpret s 62A(2)(*a*) as merely requiring an evaluation of the reasons why a litigant was unable to secure a witness's attendance. This may be a strained interpretation of the provision, since a plain reading of s 62A(2)(*a*) would indicate that the reasons evaluated should be those given by the witness for not giving evidence in Singapore. Nevertheless, it is an interpretation that the provision is capable of bearing. It is well established that the court can adopt a strained construction of a statutory provision if doing so would further its legislative purpose and if adopting that provision's plain meaning would not (*Kok Chong Weng v Wiener Rober Lorenz and others (Ankerite Pte Ltd, intervener)* [2009] 2 SLR(R) 709 at [49]–[51]; Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (Lexis Nexis, 7th Ed, 2017) at para 8.6).

32 In the final analysis, however, we determined that it was unnecessary for us to adopt a strained interpretation of s 62A(2)(*a*) to give effect to its legislative purpose. Our reasons follow.

33 Section 62A is located in Part II of the EA, which deals with the use of oral evidence to prove facts. The preceding section, s 61, provides that "[a]ll facts, except the contents of documents, may be proved by oral evidence", while s 3(1) defines "oral evidence" as "all statements which the court permits or requires to be made *before it* by witnesses in relation to matters of fact under inquiry" [emphasis added]. A plain reading of s 3(1) indicates that oral evidence must be given in the court's presence. In any case, this must have been the assumption since the drafters could not have envisaged the use of live video transmissions in court at the time the EA was drafted (more than 100 years ago). In 1996, Parliament amended the EA to include, amongst other things, the present s 62A. Following this amendment, s 62A(8) of the EA provided that a

witness giving evidence in accordance with s 62A (*ie*, via video link) shall be deemed to be giving evidence in the court's presence. This amendment, however, did not detract from the default position that witnesses were to give their oral evidence in the court's physical presence since, pursuant to s 62A(1), the court's leave is required before oral evidence can be given by way of video link.

34 A textual analysis of s 62A reveals that its purpose is to provide the court with a *broad* discretion to receive oral evidence by video link in civil proceedings. This is demonstrated by the fact that s 62A(1)(*d*) gives the court an overarching discretion to grant leave in situations falling outside of ss 62A(1)(*a*) to (*c*). We digress for a moment to note our agreement with counsel for the respondents that s 62A(1)(*d*) is only applicable to cases falling outside of the situations stipulated in ss 62A(1)(*a*) to (*c*). Reading it otherwise would render ss 62A(1)(*a*) to (*c*) tautological and it is a trite rule of statutory construction that Parliament is generally assumed not to have legislated in vain (*Tan Cheng Bock* at [38]). Even so, the effect of s 62A(1) as a whole is to provide the court with a broad discretion to allow witnesses to testify via video link in almost all conceivable situations that may arise in civil proceedings. Consistently with this, s 62A(3)(*h*) gives the court wide powers to make any order that it "considers necessary in the interests of justice". The only stipulated limit on this power is found in s 62A(5), which provides that the court shall not grant leave under s 62A or include a particular provision in an order under that section if doing so would be inconsistent with its "duty to ensure that the proceedings are conducted fairly to the parties to the proceedings".

35 Likewise, a textual reading of s 62A(2), the subsection providing specifically for evidence to be given by witnesses abroad, indicates that it is meant to provide the court with a broad discretion to receive oral evidence by

video link in civil proceedings. The subsection directs at the very beginning that the court "*shall* have regard to *all* the circumstances of the case" [emphasis added]. It then sets out three specific matters for the court's consideration, the first of which relates to the reasons for the witness's inability to testify in the courtroom itself. While that requirement implies that such applications would usually be made by reason of some inability to travel on the part of the witness, it cannot by itself override the direction to the court at the beginning to take *all* the circumstances into account. The direction indicates that the court is not meant to be constrained in the factors that it may take into account and may, in its discretion having regard to other material facts, determine whether the non-fulfilment of the requirement of inability to travel should scuttle the application. This is a broad discretion which aligns the purpose of s 62A(2) with that of s 62A as a whole. Indeed, there was no evidence that Parliament intended for the court to possess a narrower discretion in the context of overseas witnesses.

36 In our judgment, s 62A(2)(*a*) is not meant to operate as a pre-condition or a fetter on the court's broad discretion to consider all the circumstances of a case under s 62A(2). In other words, it is not a requirement that has to be satisfied in every case. Instead, it is only meant to direct the court's attention to what Parliament thought was an important consideration to be given appropriate, but not conclusive, weight in the light of all the circumstances before the court.

37 While Hansard does not shed any light on the specific purpose of s 62A(2)(*a*), in his second reading speech on the amendment bill, the then Minister for Law did mention that the broad purpose of s 62A was to clarify and *enlarge* the court's powers to grant leave for a witness to give oral evidence in civil proceedings by video link. This was entirely consistent with the broad

purpose of s 62A and s 62A(2) that we have identified above. Since the relevant portion of the debate is fairly short, we reproduce it in full here for convenience (*Singapore Parliamentary Debates, Official Report* (18 January 1996) vol 65 at cols 449-457, Prof S Jayakumar, Minister for Law):

> … Let me now turn to new section 62A which allows a witness with leave of the court to give evidence through a live video or live television link in civil proceedings. This will be allowed in any of these circumstances: where the witness is below 16 years of age; where it is expressly agreed between the parties to the proceedings that evidence may be so given; where the witness is outside Singapore; or where the court is satisfied that it is expedient in the interest of justice to do so.
>
> This section is intended to create a proper legislative framework and to *clarify and enlarge the court's powers in relation to evidence given by live video and television links*. Let me clarify that it does not mean that the Court did not have jurisdiction to order the evidence of a witness to be taken by live video or television links in civil proceedings before the enactment of this amendment.
>
> I might add, Sir, that the court must not make an order for video link testimony or include a particular provision in such an order, if to do so would be inconsistent with the court's duty to ensure that the proceedings are conducted fairly for the parties. …
>
> [emphasis added]

38 Pursuant to s 62A(2)(*a*), in determining whether to grant leave under s 62A(1)(*c*), the court will examine whether a witness is in fact unable to travel to Singapore based on the reasons given by that witness. As mentioned above, witnesses would only be "unable" to travel to Singapore for the purposes of s 62A(2)(*a*) if they were prevented from doing so by circumstances outside their control. This undoubtedly includes situations involving physical or legal inability, such as where the witness cannot travel to Singapore because of a medical condition or because of travel restrictions imposed by the authorities of his country of residence. It also includes situations where witnesses cannot travel because of real and substantial threats to their personal safety.

We recognise that there would be situations where the line between choice and inability may not be clear. It would, however, be inappropriate for us to lay down a bright-line rule for this purpose since the question of whether a witness is unable to travel to Singapore is ultimately one that has to be assessed on the facts of each case.

Mr Sekhon was not unable to give evidence in Singapore

39 We agreed with the Judge that Mr Sekhon was not unable to give evidence in Singapore but was merely unwilling to do so (GD at [38]). It was undisputed that the sole reason why he did not want to travel to Singapore was to avoid possible prosecution for his role in the acquisition of the Property. While we accepted that there was a real possibility of his facing prosecution in Singapore, plainly his desire to avoid prosecution could not deprive him of the ability to travel here. Quite apart from whether Mr Sekhon's desire to avoid prosecution contravened public policy, we thought that it would be highly unlikely for any court to conclude that a witness's desire to avoid the normal operation of Singapore legal processes, whether criminal or civil, would amount to an inability to travel here. In this case, we could not find any justification to conclude otherwise. As such, we were not persuaded that Mr Sekhon was "unable", within the meaning of that word in s 62A(2)(*a*), to travel to Singapore.

Overall, the circumstances of this case pointed in favour of granting leave

40 In denying leave to Mr Sekhon, the Judge held that his unwillingness to travel to Singapore was a "weighty factor that pointed against allowing the [leave] application" (GD at [38]). The Judge did not find it necessary to consider whether there was any other relevant factor in this case that would point in favour of allowing the leave application or would require balancing with the witness's unwillingness to travel.

41 Unlike the Judge, we did not think that a witness's unwillingness to travel, although a weighty consideration against remote testimony as a factor that the statute specifically highlights for the court's consideration, could always by itself be determinative of an application for leave under s 62A. Our view was that whether the weight of that factor could be displaced would depend on a holistic assessment of the circumstances of each case.

42 In our view, with respect, the Judge had erred in failing to give appropriate weight to the following factors that pointed in favour of granting leave:

(a) First, Mr Sekhon was not a party to the litigation or in control of it and would not stand to gain any tangible benefit from it.

(b) Second, the appellant could not compel Mr Sekhon to testify in Singapore, had no control or influence over him, and could only rely on his willingness to testify in Suit 580.

(c) Third, Mr Sekhon was an important witness who would be able to give evidence on critical factual issues.

(d) Fourth, the appellant would be prejudiced by the refusal of the leave application as he would be deprived of the opportunity to call a key witness and, conversely, the respondents would not suffer any equivalent or significant prejudice if leave were granted.

(e) Finally, neither Mr Sekhon nor the appellant was seeking to achieve a collateral purpose or to abuse the court's process through Suit 580 or the leave application.

43 We deal with each of these points in turn.

(1) Mr Sekhon was not a party to Suit 580 and had no control of how it was conducted

44 There was force in the argument that a party (or witness) who desires the fruits of a litigation brought in a particular forum should generally be expected to attend proceedings in the court of that forum to obtain justice. It was also clear the default rule in Singapore was for witnesses to be present in court to testify, and plaintiffs who choose to sue here are generally expected to comply with that rule. These considerations might well apply with equal force where the witness in question, though not a party to the litigation, controlled the conduct of the litigation.

45 However, courts have also recognised that different considerations apply when witnesses are persons who are not involved with the conduct of the litigation ("non-party witnesses") and that the threshold for granting leave to non-party witnesses should generally be low. Such an approach was adopted, at least implicitly, in *Sonica Industries* where this court granted leave to a non-party witness to testify via video link although there was no evidence to show that the witness in question was unable to attend proceedings in Singapore. There, the plaintiff, Sonica Industries Ltd, alleged that the defendant, Fu Yu Manufacturing, had breached a contract to supply and deliver computer monitors to the plaintiff. The plaintiff alleged that this breach caused its customer, Kanematsu, to cancel orders that the latter had placed with it for the same type of monitors. Before the trial began, the plaintiff obtained the court's leave for a Mr Kawamura, the manager of Kanematsu's computer business and Kanematsu's key point of contact with the plaintiff at all material times, to give his evidence-in-chief orally at the trial. The plaintiff also sought to call a Mr Paul Lee, whose evidence pertained to the credibility of Mr Kawamura and the defendant's other witnesses. However, the plaintiff was unable to secure the

attendance of both Mr Kawamura and Mr Paul Lee at the trial and it applied for leave for them to give evidence by way of video link on the first day of trial (at [4]). The High Court dismissed this application.

46 This court, however, allowed the plaintiff's appeal against the High Court's decision and granted Mr Kawamura leave to testify via video link. This was despite the lack of any evidence to show that Mr Kawamura was *unable*, rather than merely unwilling, to attend proceedings in Singapore. Instead, a holistic assessment of the facts was undertaken in which it was noted that:

(a) The plaintiff had made several attempts to invite Mr Kawamura to Singapore;

(b) The plaintiff had no control over Mr Kawamura;

(c) The plaintiff had no way to compel him to travel to Singapore if he refused to do so, and could only rely on his willingness to help them;

(d) Mr Kawamura was an important witness who would give evidence on material issues (*Sonica Industries* at [5]); and

(e) The defendant would not suffer any prejudice if Mr Kawamura was granted leave (*Sonica Industries* at [11]–[13], [17]).

The approach to Mr Kawamura's testimony in *Sonica Industries* demonstrates that a non-party witness's unwillingness to travel to Singapore need not always be treated as a determining factor against the granting of leave to non-party witnesses. In contrast, the High Court's decision to deny Mr Paul Lee leave was upheld on the basis that his evidence was going to be peripheral at best.

47 It is convenient at this point for us to deal with *Bachmeer Capital Ltd v Ong Chih Chung and others* [2018] 4 SLR 29 ("*Bachmeer Capital*"). This was a decision of the Singapore International Commercial Court. The respondents relied on it to submit that a witness's unwillingness to travel to Singapore was a weighty factor against granting leave. There, Vivian Ramsey IJ refused to grant leave to a witness, a Mr Lee, who wanted to testify via video link in a Singapore civil trial to: (i) avoid the inconvenience of travelling to Singapore; and (ii) save time and costs (at [16] and [19]). Ramsey IJ found that Mr Lee's desire to avoid inconvenience *per se* was an insufficient reason for granting the leave requested, especially when considered against the importance of having a witness give important evidence in person (at [19]). In contrast, the judge granted leave to testify remotely to another important witness, Chairman Yang ("Mr Yang"), who could not attend the Singapore trial as he was unable to obtain his passport and the necessary travel permission from the relevant authorities in China (at [24]). Ramsey IJ held (at [25]) that, although allowing Mr Yang to testify by video link would cause a degree of prejudice to the party cross-examining him, this was preferable to the unsatisfactory alternative of the court being unable to obtain his evidence at all on an important point.

48 In our view, the respondents' reliance on *Bachmeer Capital* was misplaced. First, the facts of *Bachmeer Capital*, and those pertaining to Mr Lee in particular, can be distinguished from the present case on the basis that Mr Lee was merely *reluctant* rather than *unwilling* to travel to Singapore. Consequently, the parties calling Mr Lee would not have been deprived of the opportunity to adduce his evidence if leave were refused since Mr Lee would presumably, albeit reluctantly, travel to Singapore to testify (as he eventually did) (at [20]). In contrast, one can reasonably draw the conclusion that Mr Sekhon would be unlikely to travel here if leave were refused given his reasons for being

unwilling to do so. In the former situation, departing from the default position would simply have been for the convenience of a witness. In this case, however, a refusal to grant leave would inevitably result in the appellant being deprived of the opportunity to adduce important evidence through Mr Sekhon. Second, in finding that Mr Yang had provided sufficient reason to be granted leave under s 62A(1)(*c*), the court did not lay down a general proposition that a witness must be unable to travel here before leave will be granted. At best, it stood for the proposition that leave to testify remotely would generally be granted to an important witness if that witness was unable to attend proceedings in Singapore.

49 The reason why non-party witnesses are treated differently from plaintiffs was persuasively elucidated by Clarke J in *Moorview Developments Ltd v First Active plc* [2009] 2 I.R 788 ("*Moorview Developments*") (at [70]–[71]):

> It seems to me that the general consideration of the reason why the witness concerned is unwilling to give evidence in court in the ordinary way remains an important factor to be taken into account. *The weight to be attached to such factor is likely to be significantly greater where the person concerned is a plaintiff who has chosen to bring proceedings in this jurisdiction. Less weight may attach in the case of a defendant who has not, after all, chosen the venue for the proceedings. Less weight still must be applied in the case of a mere witness.* … Where there is no good reason … then the court is entitled to take that factor into significant account, *most especially where the person unwilling to come to the jurisdiction and give evidence in person is a party (and particularly the moving party).* …
>
> However, it seems to me that the situation which arises in this case is significantly different from that which arose in *Polanski v. Condé Nast Publications Ltd.* [2005] UKHL 10, [2005] 1 W.L.R. 637. *Here the person who fears arrest is not a party wishing to bring proceedings before the court but rather is a witness whom a third party wishes to give evidence on their behalf.* To take an extreme, but illustrative, example one could envisage an entirely innocent victim of catastrophic injuries whose case on liability (and thus whose prospect of receiving monies to give them a comfortable life) was dependent wholly or substantially on the evidence of someone who was a fugitive from the criminal

> law of this jurisdiction but who had managed to escape to a country which did not have extradition arrangements with Ireland. *Could it be said that the innocent plaintiff should be deprived of his damages because evidence could not be obtained either on commission or by video link from the witness concerned because that witness was a fugitive from the law of this jurisdiction. I think not.*
>
> [emphasis added]

50 The *Moorview Developments* case concerned an application by the plaintiffs in that case for leave for a witness, the solicitor of the plaintiffs and their related companies at the material time, to testify in court by way of video link. The former solicitor had refused to set foot in the jurisdiction for fear of being arrested for contempt of court and other criminal offences. Pursuant to O 63A r 23(1) of the Rules of the Superior Courts 1986, the Irish court was empowered to "allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means". Having observed that the court possessed a broad discretion in determining whether to grant leave, Clarke J allowed the plaintiffs' application, holding (at [73]–[74]) that:

> While, therefore, there are serious questions as to whether Mr. Lynn would be entitled to give evidence by video link in proceedings in which he was a party or was closely connected to a party (especially a moving party), *I believe different considerations apply in a case where he is purely a witness.*
>
> … [I]t does not seem to me that I could take the view at this stage that Mr. Lynn's evidence might not be material to a reasonable extent to some of the issues which I will ultimately have to determine. *It, therefore, remains possible that the failure to have his evidence available could lead to an injustice to the Cunningham Group which would not stem from any action on their part but rather from Mr. Lynn's status. It would seem to me that such a consequence would be disproportionate.*
>
> [emphasis added]

51 This distinction between claimants, defendants, and non-party witnesses had also been adopted by various other common law judges. Lord Slynn of Hadley in *Polanski (HL)*, for example, observed that it would be relevant to

consider whether a witness was a claimant or defendant in determining if leave should be granted for the witness to testify by video link (at [51]). Likewise, Simon Brown LJ in *Polanski v Condé Nast Publications Ltd* [2004] 1 WLR 387 ("*Polanski (CA)*") also observed that a witness's role in the proceedings will be a relevant consideration when determining if leave should be granted for the witness to testify via video link. In particular, Simon Brown LJ observed that the court will more readily grant leave "in favour of a defendant than a claimant, and *more readily still in favour of a witness who is not a party at all*" [emphasis added] (at [46]).

52 While we noted that in the cases cited there was no statutory provision delimiting a witness' inability to travel to the court's location as a basis to grant leave, we considered that the reasoning in those cases was also consistent with the well-established principle in Singapore law that a litigant can pray in aid of the court's machinery to enforce his or her *fundamental* right "to bring all evidence *relevant* to his or her case to the attention of the court" [emphasis in original] (*Basil Anthony Herman* at [24]). In the context of competent and compellable witnesses located in Singapore, the court will assist a litigant by compelling "on the pain of contempt, all persons who are in a position to give relevant evidence, to come forward and give it" (*Basil Anthony Herman* at [24]). Since the court extends such assistance to litigants whose witnesses are in Singapore, there is no good reason why it should be less willing to assist litigants whose witnesses, through no fault of the litigants, refuse to come to Singapore to give evidence.

53 For these reasons, we were of the view that a witness's status in the litigation would influence the threshold for granting leave. All things being equal, the court should generally be more willing to grant leave to a witness who is not a party to the litigation and has no control over it. Although s 62A(2)(*a*)

does not distinguish between witnesses who are parties to the proceedings and those who are not (see GD at [31]), there is nothing prohibiting the court from taking the witness's status in a litigation into account when exercising its broad discretion under s 62A(2).

54 In this case, the fact that Mr Sekhon was neither a party to Suit 580, nor had control over it weighed in favour of leave being granted even though he was able but unwilling to travel to Singapore.

(2) Mr Sekhon would not derive any tangible benefit from Suit 580, whether directly or indirectly

55 We considered that it was relevant for us to consider whether the witness in question would derive any tangible benefit from the litigation, whether directly or indirectly. If a witness stands to derive a tangible benefit from the litigation, there may be a greater expectation that that person should travel to Singapore to testify.

56 In this case, there was no evidence to suggest that Mr Sekhon would derive any tangible benefit from Suit 580, whether directly or indirectly. We noted that the appellant stated that he would return the $2,056,405.60 that Mr Sekhon transferred to him for the purposes of complying with a confiscation order if he succeeded in Suit 580. However, the return of these funds did not constitute a relevant benefit to Mr Sekhon for the present inquiry since: (i) Mr Sekhon was under no legal obligation to indemnify the appellant; and (ii) Mr Sekhon would not be in a better position than he would otherwise have been if the appellant succeeds in Suit 580. While the return of the $2,056,405.60 might relieve Mr Sekhon from the *moral* obligation to assist the appellant financially, this was an intangible benefit that the court should not, and did not, take into account.

(3) The appellant had no control over Mr Sekhon who was not compellable

57 In our view, the degree of control that a party has over the overseas witness in question is a relevant consideration in determining whether leave should be granted under s 62A(2). The relevance of this factor was recognised by this court in *Sonica Industries* where it observed, *inter alia*, that: (i) the plaintiff had no control over Mr Kawamura and could only have relied on his willingness to help them; and (ii) the plaintiff had made the necessary attempts to secure Mr Kawamura's presence at the trial (at [12]). Generally speaking the more control a party has over a witness, the stronger the justification required to displace the expectation that the witness would be present in court to testify. Conversely, the fact that a party has no control over a witness who refuses to travel to Singapore should generally weigh in favour of leave being granted. This is subject to the qualification that the party must have made all reasonable attempts to secure the witness's attendance in Singapore (*Sonica Industries* at [12]).

58 Whether a party has control over a witness is obviously a question of degree that would depend in turn on the facts and circumstances of each case. Control may be present, for example, if the witness in question was the litigant's employee at the time of trial.

59 In this case, Mr Sekhon could not be compelled to testify in person since he resides overseas and a subpoena cannot be served on any person outside Singapore (see, O 38 r 18(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). There was also no evidence that the appellant had any degree of control over Mr Sekhon whether by way of employment or otherwise. Indeed, it was the appellant's uncontradicted evidence that his relationship with Mr Sekhon had

deteriorated to such an extent that they no longer communicated directly and only did so through their solicitors. While the appellant appeared not to have adduced evidence on the efforts he had made to try to secure Mr Sekhon's attendance, we did not think that this was fatal to his application. Given Mr Sekhon's reasons for refusing to travel to Singapore, there was practically nothing that the appellant could have done to convince him otherwise. Indeed, the respondents did not suggest that the appellant could have done more to secure Mr Sekhon's attendance at the trial of Suit 580. This therefore weighed in favour of leave being granted.

(4) Mr Sekhon was a witness who could give material evidence on critical factual issues in Suit 580

60 In our view, the more important a witness's evidence is to the main issues in a litigation, the more willing a court should be to grant leave. Indisputably, it is in the interests of justice for the court to have access to all the relevant facts and evidence for the purposes of deciding on the material factual allegations raised by the parties. In such situations, the court's willingness to grant leave stems from the fact that a denial of leave would likely mean that no evidence from that witness could be adduced before the court.

61 The court's interest in achieving justice is a separate and distinct consideration from the prejudice that may be suffered by the party seeking to call the witness if leave were denied, though there will often be substantial overlaps between the two factors. As McCloskey J observed in *Flanagan v Britvic (NI) plc and another* [2013] NIQB 73 at [11]:

> … [T]he correct approach to the Court's determination of this kind of issue is not confined to a consideration of *the parties*. ***The prism is not bilateral. It is, rather, triangular in nature, involving also the Court.*** Thus the question of the Court's ability to determine any claim in accordance with the

> interests of justice and according fairness in full to both parties will always be a material consideration. … [emphasis added in bold italics]

62 We considered Mr Sekhon an important witness in Suit 580 for the following reasons:

(a) First, a key plank of the appellant's pleaded case was that the respondents had failed to advise him on the legality of the transaction despite Mr Sekhon informing Ms Yasmin during a meeting on 20 October 2006 that he was keen for the appellant to hold the Property on his behalf. In contrast, the respondents pleaded that Mr Sekhon had, at that same meeting, verbally informed Ms Quah that the Property would be purchased in the appellant's own name. Based on the appellant's pleaded case, Mr Sekhon was the one who liaised with the respondents during this period. His evidence on what was discussed during the meeting on 20 October 2006 would thus be important for the purposes of establishing the extent of the respondents' *knowledge* of the manner in which the Property would be acquired and held. In this regard, Mr Sekhon's evidence was not being introduced simply to corroborate the appellant's evidence on the circumstances of the Property's acquisition.

(b) Second, the appellant has also pleaded that both he and Mr Sekhon had informed Ms Yasmin, in a subsequent meeting in October 2006, that the appellant had agreed to purchase the Property on Mr Sekhon's behalf and that Ms Yasmin had (negligently) confirmed that this arrangement was acceptable. While the appellant was capable of giving evidence on what had transpired during this meeting, the lack of any contemporaneous documentation of the discussion meant that the

trial court was likely to be faced with a "he said/she said' situation and thus the oral accounts of all participants at the meeting, tested by cross-examination, would help the court to ascertain what in fact occurred. Mr Sekhon's evidence could potentially corroborate the appellant's account of that meeting and shed light on what transpired there.

(c) Third, the respondents pleaded that Ms Yasmin had verbally informed the appellant during a meeting on 17 November 2006 that it was unlawful for him to purchase and hold the Property on Mr Sekhon's behalf. They also pleaded that the appellant thereafter confirmed with Ms Yasmin that he was "buying the Property in his personal and legal capacity". According to the appellant's pleaded case, both he and Mr Sekhon were present at this meeting. Again, given the lack of any documentary evidence of what was discussed during this meeting, Mr Sekhon's evidence was likely to be important to the appellant for the purposes of rebutting the respondents' case.

63 For these reasons, we were of the view that Mr Sekhon's evidence was likely to be very important in the disposal of the main issues in Suit 580.

(5) The appellant would have been prejudiced if leave were refused while the respondents would have suffered no prejudice if leave were granted

64 Pursuant to s 62A(2)(*c*) of the EA, the court has to have regard to the question of "whether any party to the proceedings would be unfairly prejudiced" by the grant *or* refusal of leave. This question of unfair prejudice is also an overriding consideration when determining if leave should be granted under s 62A (*Sonica Industries* at [15]). As is usual in cases of this nature, the relevant prejudice must be of a kind that cannot be compensated by an appropriate order for costs. It should be noted that sub-s (2)(*c*) implicitly recognises that there will

be some degree of prejudice whether an order is granted or refused, so the concern is that prejudice should not be "unfair" in all the circumstances.

65 In our view, the appellant would have suffered serious prejudice if leave were refused, while on the facts of the present case the respondents would not suffer any comparable prejudice if leave were granted.

66 The most obvious prejudice that a party seeking to call an overseas witness would suffer in this context would be the restriction on its ability to adduce all relevant evidence in support of its case. The denial of leave in such circumstances would almost always result in the overseas witness's evidence being inadmissible, which could in turn have grave consequences on the litigant's ability to put its best case forward. This prejudice is clearly of a kind that cannot be remedied by an order for costs. In *Sonica Industries*, for example, this court in took into account the fact that a refusal of leave would deprive the plaintiff of the opportunity to adduce critical evidence as a reason for granting leave to the witness in question (at [17]). Likewise, in *Erceg (Millie) v Erceg (Lynette) (Mode of Evidence)* [2016] NZAR 85 ("*Erceg v Erceg*") the New Zealand High Court granted an application by a mother for her adult son to testify as a witness via video link on the same basis. There, the son, who was not a party to the mother's suit, had chosen to remain outside New Zealand in order to avoid being arrested for tax offences (at [26]). In granting the mother's application, Venning J observed, *inter alia*, that the mother would be disadvantaged if the son was denied leave because she would be inhibited in presenting her best case (at [28]). In *Moorview Developments*, Clarke J similarly placed significant weight on the "injustice" that would have been suffered by those plaintiffs through no fault of theirs in granting leave to the former solicitor to testify via video link (*Moorview Developments* at [74], cited above at [50]).

67 As mentioned above, Mr Sekhon was likely to be an important witness for the appellant in Suit 580. In *Basil Anthony Herman*, this court cautioned, albeit in the context of granting subpoenas, that trial judges should always remember that "grave consequences might flow from the wrongful exclusion of evidence" (at [26]). That caution applied with equal force in the present context since refusing Mr Sekhon leave would have the practical effect of rendering his affidavit of evidence-in-chief inadmissible since he will not be available for cross-examination. This would have been a disproportionately severe consequence for the appellant that would have arisen through no fault of his own.

68 The respondents submitted that they would be prejudiced in the following manner if Mr Sekhon was granted leave:

(a) First, they would be required to incur additional legal costs in sending a solicitor to Australia to ensure that Mr Sekhon would not be assisted by visual aids or prompters during his testimony.

(b) Second, and in any event, they contend that fair conduct of Suit 580 would require witnesses, including Mr Sekhon, to be cross-examined in person since the court's determination of the key issues would turn on its assessment of their credibility, which would in turn require it to assess the witnesses' demeanour in the courtroom.

69 We were not persuaded that these reasons amounted to unfair prejudice in the present context.

70 First, any additional expense reasonably incurred by the respondents due to a departure from the usual mode of taking evidence could easily be compensated for by an appropriate order for costs. We therefore gave little

weight to the respondents' contention they would have to incur additional expense to send a solicitor to Australia. Further, there may be a query as to whether this would be a reasonable expense since Australia is well populated with competent lawyers who could represent the respondents at the taking of Mr Sekhon's evidence.

71 Second, although there was a real likelihood that the trial court's decision in Suit 580 would turn on the trial judge's assessment of the witnesses' credibility, this would not have resulted in unfair prejudice to the respondents if leave were granted. As this court observed in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [42], a court's assessment of a witness's credibility would, and should, seldom hinge on that witness's demeanour on the stand (*ie*, behavioural patterns that are not reflected on the transcript, see Thomas Bingham, *The Business of Judging* (Oxford University Press, 2000) at 8). As such, we were not persuaded that a trial judge's assessment of a witness's credibility would be hindered if that witness was not some "ten feet away in the witness box" (see, *eg*, *Asia-Pac Infrastructure Development Ltd v Ing Yim Leung Alexander and others* [2011] 1 HKLRD 587 ("*Asia-Pac Infrastructure*") at [62]; *Polanski (CA)*, *per* Simon Brown LJ at [29]; *Bachmeer Capital* at [18]). In any case, trial judges can take into account any particular deficiencies arising from the use of video link testimony when deciding on the weight to be assigned to a witness's evidence (*McGlinn v Waltham Contractors Ltd and others (No 2)* [2006] EWHC 2322 at [11]). We noted that it has been observed that "the solemnity of the court atmosphere and the threat of immediate sanction" was conducive to obtaining truthful testimony from a witness (In *Re Chow Kam Fai ex parte Rambas Marketing Co LLC* [2004] 1 HKLRD 161 ("*Re Chow Kam Fai (CFI)*") at [28]; *Erceg v Erceg* at [14]). In our view, however, questions about a *particular*

witness's truthfulness would be a matter for a trial judge to determine based on all the evidence before the court. It is, therefore, unhelpful for us to speculate as to whether, generally speaking, testifying in court necessarily encourages witnesses to be more truthful than when testifying via video link.

72 Even if the respondents would be prejudiced in the manner that they alleged, such prejudice had to be *balanced* against the prejudice that the appellant would have suffered if leave were denied. In our view, any prejudice that the respondents would suffer in this case paled in comparison to the severe prejudice that the appellant would suffer if they were denied the opportunity to adduce the evidence of an important witness. Additionally, any purported prejudice to the respondents could easily be ameliorated during the fact-finding process in the manner that we have just described, while there was no substitute for Mr Sekhon's evidence in this case. As such, the balance clearly weighed in favour of leave being granted.

73 For completeness, we noted that the respondents did not contend that they would be impeded in their cross-examination of Mr Sekhon due to the volume of documents involved. That said, we would observe that it would be relevant for the court to consider whether the presence of such practical difficulties may result in unfair prejudice to the opposite party. Such difficulties would include situations where the volume of documents involved is likely to cause significant impediment to the conduct of cross-examination via video link (see, *eg*, *Asia-Pac Infrastructure* at [63]). Given the state of modern technology however, such difficulties are likely to be surmountable, though this is ultimately a matter for trial judges to determine based on the facts of each case.

(6) There was no evidence that Suit 580 was brought for any collateral purpose

74 It is established that the court's processes must be protected from those seeking to manipulate it to further their own ulterior or collateral motives in an abusive or oppressive manner (*Basil Anthony Herman* at [25]). Consequently, the court would generally refuse leave to a witness if it were satisfied that the witness or the party seeking to call that witness was pursuing a collateral purpose. In *Re Chow Kam Fai (CFI)* for instance, the Hong Kong Court of First Instance rejected the defendant's application to give evidence by video link as he had disobeyed an earlier court order requiring him to attend court to be cross-examined on an affidavit in the same matter (at [36]–[37], [39]). The court observed, *inter alia*, that the defendant was in effect seeking a collateral advantage by asking it to protect him from the consequences of his having disobeyed its earlier orders (at [37]). This reasoning was affirmed on appeal (see, *Re Chow Kam Fai David* [2004] 2 HKC 645). With respect, we agree with this decision and would caution litigants that the court would be unlikely to exercise its discretion to allow video link evidence from overseas witnesses who seek a collateral advantage in any way or are shown to be disrespectful of its authority. As Sundaresh Menon JC (as he then was) pointed out in *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453, the court has an interest in "preserving and upholding its authority and dignity" (at [13]) and, in our view, this is a consideration that must be taken into account in any application under s 62A(2).

75 In this case, the Judge did not find that either the appellant or Mr Sekhon was pursuing a collateral purpose through the leave application or Suit 580. Thus, the fact remained that the appellant had a genuine and legitimate claim against the respondents in respect of which Mr Sekhon was an important

witness. We rejected the respondents' suggestion that the appellant was seeking to use Suit 580 as a vehicle to obtain Mr Sekhon's evidence for use in the criminal trial. Mr Sekhon's evidence in Suit 580, if given, would likely be inadmissible as hearsay evidence in the criminal trial unless Mr Sekhon turns up in person to testify in that trial (*Zainal bin Kuning and others v Chan Sin Mian Michael and another* [1996] 2 SLR(R) 858 at [68]; *Chua Boon Chye v Public Prosecutor* [2015] 4 SLR 922 at [42]).

Conclusion

76 When we balanced all the relevant factors that pointed in favour of granting Mr Sekhon leave against the fact that he was unwilling rather than unable to travel to Singapore, we were satisfied that the weight of the latter fact had been displaced. We were, therefore, of the view that the Judge should not have denied Mr Sekhon leave to testify via video link simply because he was able but unwilling to travel to Singapore. Instead, the circumstances of this case pointed overwhelmingly in favour of granting Mr Sekhon leave.

77 We hasten to add that the factors that we took into account in this case are not meant to be an exhaustive list of the considerations relevant to the exercise of the court's discretion under s 62A(2). Trial judges are entitled to take into account any other relevant and material factor that may arise in the particular cases before them.

78 We now turn to explain why we disagreed with the Judge's conclusion that granting Mr Sekhon leave would contravene the public policy of Singapore.

The leave application and public policy

79 The respondents submitted that the Judge was right to have denied Mr Sekhon leave as it would have been contrary to public policy to do so, given his self-professed desire to avoid the reach of Singapore law. The court would essentially be facilitating Mr Sekhon's avoidance of the normal processes of the law if it granted leave. This breach of public policy was aggravated by the fact that Mr Sekhon's evidence would serve to exculpate him from the very offence that he sought to avoid prosecution for.

80 The appellant submitted that the Judge was wrong to have denied leave on the basis that doing so would bring the administration of justice in Singapore into disrepute. First, he submitted that the Judge should not have adopted the minority's position in *Polanski (HL)* as a blanket or general rule. Instead, the competing policy considerations outlined by the majority judges in *Polanski (HL)* should be weighed and balanced on the facts of each case. Secondly, he submitted that the minority's concerns relating to assisting a fugitive to avoid justice do not apply with the same vigour in this case and should not outweigh the appellant's right of access to justice.

81 Neither party disputed that the court could legitimately take public policy into account when exercising its discretion under s 62A(2). Indeed, no objection could be raised as s 62A(2) requires the court to have regard to "all the circumstances of the case". This wording is broad enough to enable the court to consider the wider implications of granting or refusing leave to a particular witness. The Judge took the same position (GD at [40]).

82 Bearing the above in mind, we considered whether granting leave to Mr Sekhon in this case would contravene any public policy and, conversely, whether denying him leave would contravene any domestic public policy.

83 In their submissions the parties identified two potentially relevant public policy considerations:

(a) The first, which was asserted by the appellant, was his right of access to justice, in particular, his entitlement to put forward his best possible case and the relevant evidence in support thereof.

(b) The second, which was asserted by the respondents and adopted by the Judge (GD at [39], [47]), was that the court should not facilitate a person's attempt to evade justice.

84 We considered that both policy considerations had been correctly identified. First, as we stated at the outset of these grounds, the appellant had a right to adduce all evidence relevant to his case. In *Basil Anthony Herman*, this court recognised the existence of such right and deemed it to be "fundamental" albeit subject to the rules regarding admissibility and procedure (at [24]–[25]). Secondly, while the policy that a court should not assist a person in an attempt to evade justice has not been as clearly expressed in case law, we considered this principle to be "so fundamental that it require[d] no authority to be cited in support of it" (to use the words of V K Rajah JA in *Basil Anthony Herman* at [24]). Indeed, the appellant accepted the existence of this policy.

85 In our view, allowing Mr Sekhon to testify via video link in Suit 580 did not amount to assisting or facilitating any attempt to evade justice, or endorsing his attempt to do so. Consequently, granting him leave did not contravene any domestic public policy.

86 First, and most importantly, we did not think that Mr Sekhon was attempting to evade justice in Singapore. He had left Singapore for Australia in May 2012, months before the CAD's raid on the appellant's house in December 2012. There was no evidence to suggest that Mr Sekhon had left Singapore in order to avoid potential investigations into, or prosecution for, the acquisition of the Property. Further, his desire to remain outside Singapore after learning about investigations into the acquisition of the Property did not amount to an attempt to evade justice. He had not been charged, let alone convicted. Since Mr Sekhon had not been convicted of any offence, he was entitled to be presumed innocent, and there was no basis to expect that he should return to Singapore to "face the music". Bearing in mind that Singapore has extradition arrangements with Australia, it also follows that granting him leave could not be seen as providing him with any assistance to evade justice. This was in stark contrast to the *Polanski* case, where Mr Polanski was living in a country which did not have extradition arrangements with the United States and wanted to avoid the United Kingdom which did have such arrangements. This was because he wanted to avoid extradition to the United States to serve a sentence for a crime that he had already been convicted of. Thus, the mere fact that Mr Sekhon wanted to stay out of Singapore to avoid a possible prosecution here would not have resulted in any public policy contravention if he were granted leave to testify in Suit 580 via video link.

87 Second, Mr Sekhon was not the party seeking the aid of the Singapore court, nor would he derive any tangible benefit, whether directly or indirectly, if the appellant succeeded in his claim. Instead, the appellant was the claimant in Suit 580 and there was no suggestion that he contributed to Mr Sekhon's absence from Singapore in any way. Denying Mr Sekhon leave would not have made it more difficult or disadvantageous for Mr Sekhon to remain outside

Singapore. By contrast in the *Polanski* case the witness in question was the claimant in the suit, which he had started while "a fugitive from justice to evade sentence for a crime of which he had been convicted" (per Jonathan Parker LJ at [57] of *Polanski (CA)*), and stood to gain from being allowed to give his evidence from outside the United Kingdom.

88 Finally, we respectfully disagreed with the Judge's conclusion that leave should not be granted as granting it would allow Mr Sekhon to rely on evidence given in Suit 580 to "exculpate" himself in criminal investigations into his role in the acquisition of the Property (GD at [49]). Simply put, we did not see the force of the Judge's reservations since Mr Sekhon did not need to give evidence in Suit 580 in order to advance a defence at the investigation stage. This could be done in other ways such as by written representations to the CAD or prosecution directly. If so, the CAD or prosecution would then have to make their own assessment as to the appropriate course of action. In any case, we bore in mind that Mr Sekhon had not been charged with an offence and any concern about him relying on the court's findings in Suit 580 was speculative at best.

89 While granting Mr Sekhon leave would not violate any public policy, denying him leave would deprive the appellant of his right to adduce all the evidence relevant to his case. In the final analysis, we were satisfied that in this case there was no public policy interest that required the rejection of the leave application.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

Deborah Evaline Barker SC, Ushan Premaratne, and Jonathan Tan
(Withers KhattarWong LLP) for the appellant;
Chandra Mohan Rethnam and Ang Tze Phern
(Rajah & Tann Singapore LLP) for the respondents.
