

42/12; [2012] VSC 628

SUPREME COURT OF VICTORIA

RSPCA (VIC) INC v BURWOOD DEVELOPMENTS PTY LTD

Vickery J

28 November 2012

PRACTICE AND PROCEDURE – APPLICATION TO TAKE EVIDENCE BY VIDEO LINK – DISCRETIONARY CONSIDERATIONS – REQUIREMENT TO MAKE OUT A CASE FOR SUCH AN ORDER WHERE IT IS OPPOSED – WITNESS OVERSEAS – REQUIRED FOR CROSS-EXAMINATION FOR AT LEAST HALF A DAY – WITNESS A CENTRAL ELEMENT OF THE PLEADED CASE – WHETHER ORDER SHOULD BE MADE: *EVIDENCE (MISCELLANEOUS PROVISIONS) ACT 1958*, s42E(1).

HELD: Application for evidence to be given by video link refused.

1. There are provisions in the *Evidence Act* ('Act') which indicate that the normal and usual course for the Court to follow is to conduct a case by way of oral evidence. The calling of evidence by video link pursuant to s42E of the Act is simply evidence called orally in a different form.

2. Central to the issue as to whether or not it was appropriate for the witness overseas to give evidence by way of video link was the nature of his evidence. The witness was referred to in the pleadings and it was submitted that his evidence was not peripheral but that his state of mind was directly relevant to an important issue raised in the pleadings.

3. It was expected that the witness' evidence and cross-examination would take up to half a day and that was a factor to be taken into account in assessing the application and exercising the Court's discretion.

4. On the balance, the inconvenience to the witness and indeed the cost, was outweighed in this case by the need to ensure that the RSPCA had adequate and full opportunity to cross-examine the witness, who appeared to be central to one element of the pleaded case on the part of the RSPCA. Accordingly, the application for the video link was refused.

VICKERY J:

1. This is an application made by the Defendant, Burwood Developments Pty Ltd and Second Plaintiff by Counterclaim, Burgundy Two Pty Ltd (together known as "Burwood and Burgundy"), to call a Mr John Hunter to give evidence by way of video link pursuant to s42E(1) of the *Evidence (Miscellaneous Provisions) Act 1958* ("the Act"). This section provides that

[s]ubject to section 42F and to any rules of court, a court may, on its own initiative or on the application of a party to the legal proceeding, direct that a person may appear before, or give evidence or make a submission to, the court by audio visual link or audio link from any place within or outside Victoria, or outside Australia, that is outside the courtroom or other place where the court is sitting.

2. Section 42F concerns special provisions applicable to certain proceedings involving children and is not relevant to this application.

3. The Act therefore allows the Court to exercise a discretion in relation to the calling of evidence in this form, subject to what is provided in s42E(2) relating to the technical requirements being satisfied to facilitate such a video link.

4. In this application it is not disputed that the Court has a facility of an adequate technical nature to provide a video link facility pursuant to s42E(2). The discretion provided by s42E(1) is at large and lies within the province of the Court to be exercised on proper principles.

5. There are provisions in the Act which indicate that the normal and usual course for the Court to follow is to conduct a case by way of oral evidence. I do not regard the calling of evidence by video link pursuant to s42E as other than the conduct of the trial by oral evidence. It is simply evidence called orally in a different form.

6. Nevertheless, I must take into account the issues that have been raised by the Plaintiff, RSPCA ("RSPCA"), in this application.

7. In support of their application, Burwood and Burgundy rely upon the affidavit of their solicitor, Ms Michelle Power. In that affidavit Ms Power refers to a number of matters which give rise to inconvenience if Mr Hunter is called to give evidence in Court as opposed to being provided with the facility to give evidence by way of video link. These inconveniences include:

- (a) Mr Hunter resides in Los Angeles in the United States of America;
- (b) Mr Hunter usually travels to Australia once a year in about July;
- (c) Mr Hunter was last in Australia in July of this year; and
- (d) Mr Hunter has a meeting with the Mayor of the City of Coachella and several of the Mayor's staff today, Monday, 26 November 2012, concerning a development in that municipality.

8. Central to the issue as to whether or not it is appropriate for Mr Hunter to give evidence by way of video link is the nature of his evidence. Mr Hunter is referred to in the pleadings, namely in the particulars to paragraph 54 of the Amended Defence to the Amended Statement of Claim and the particulars to paragraph 10E of the Amended Reply.

9. It is put by Burwood and Burgundy that Mr Hunter's evidence is peripheral to the central issues in the case, and this is so because his evidence will be supported by documentary evidence to be relied upon by them. Nevertheless, it is put by Dr Hanscombe, who appeared for the RSPCA on this application and at the trial, that Mr Hunter's evidence is not peripheral at all and that his state of mind is directly relevant to an important issue raised in the pleadings on the part of the RSPCA.

10. The RSPCA intends to put a number of documents to Mr Hunter. The procedures of the video link can be availed to sufficiently address documents to be put to a distant witness.

11. However, of note is the observation in the affidavit of Ms Power that based on her knowledge of the proceeding and her experience, she would expect Mr Hunter's evidence and cross-examination to take up to half a day. That would tend to indicate that Mr Hunter's evidence is likely to take up to and indeed could exceed one half day within the ambit of the estimate given. That is a factor to be taken into account in assessing this application and exercising the Court's discretion.

12. The Court was referred by Dr Hanscombe to the judgment of Buchanan J in *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 303)*^[1]. His Honour made reference to the position that the trend of authority seemed to emphasise the need for a persuasive case to be made out to use a video link to take evidence, particularly to impose it on an unwilling cross-examining party rather than the reverse.^[2] In this case, RSPCA finds itself in the position of an unwilling cross-examining party.

13. His Honour then went on to refer to the desirability of calling a witness live, as it were, as opposed to calling a witness through a video link. I refer to and adopt those observations, where his Honour said:

I share the concerns expressed by Spender J in *Australian Competition & Consumer Commission v World Netsafe Pty Ltd (No 1)* [2002] FCA 526; (2002) 119 FCR 303 and by Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502 about the limitation on the effectiveness of video link arrangements as a means of taking oral evidence. I am particularly troubled by the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the courtroom. Although the days are gone when witnesses are expected to feel any sense of intimidation as an aid to telling the truth, there is no doubt in my mind that the requirement to give evidence on oath or affirmation in the (generally) solemn atmosphere of a courtroom in the presence of a judge, and to answer questions in cross-examination in the presence also of cross-examining counsel, has at least three potential benefits. It enhances the prospect that the witness will remain conscious of the nature and solemnity of the occasion and of his or her obligations. It affords the cross-examiner some reassurance that the gravity and immediacy of the moment, and of the supervising presence of the judge, are not lost on the witness and the cross-examination is not thereby rendered any less effective, to the possible prejudice of the cross-examining party. It provides the court with a more satisfactory environment in

which to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court. To my mind there remains, even in the modern context, a certain “chemistry” in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness.^[3]

14. It seems to me that on the balance, the inconvenience to Mr Hunter and indeed the cost, is outweighed in this case by the need to ensure that the RSPCA has adequate and full opportunity to cross-examine Mr Hunter, who appears to be central to one element of the pleaded case on the part of the RSPCA. For this reason I refuse the application for the video link.

^[1] *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 303)* [2009] FCA 1306 [61]-[78]; (2009) 181 FCR 152.

^[2] *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 303)* [2009] FCA 1306 [77]; (2009) 181 FCR 152.

^[3] *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 303)* [2009] FCA 1306 [78]; (2009) 181 FCR 152.

APPEARANCES: For the plaintiff RSPCA (Vic) Inc: Dr K Hanscombe SC with Mr C Truong, counsel. Corrs Chambers Westgarth, solicitors. For the defendant Burwood Developments Pty Ltd: Mr P Riordan SC with Mr J Moore, counsel. Minter Ellison, solicitors.
