

**IN THE SUPREME COURT OF BELIZE, A.D. 2019**

**CLAIM NO: 513 OF 2018**

**BETWEEN**

**CHOICE BANK LIMITED  
CHOICE GROUP HOLDING LLC**

**CLAIMANTS**

**AND**

**THE MINISTER OF FINANCE  
CENTRAL BANK OF BELIZE  
THE ATTORNEY GENERAL OF BELIZE**

**DEFENDANTS**

**Keywords:** Evidence; Witness; Examination by videoconferencing; Claimants seeking for witness to give evidence in claim for administrative orders; Conference link from abroad; Whether Order to be Made; CPR Rule 29.2(2) and 29.3.

**Before the Honourable:** Mr. Justice Courtney A. Abel

**Hearing Dates:** 5<sup>th</sup> February 2019  
12<sup>th</sup> February 2019  
25<sup>th</sup> March 2019  
08<sup>th</sup> April 2019  
10<sup>th</sup> April 2019.

**Appearances:**

Ms. Sol I. Espejo for the Claimants.

Mrs. Yogini Lochan – Cave for the Defendants

Miss Briana Williams for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

**WRITTEN JUDGMENT**

**Delivered Orally and in Draft on the 10<sup>th</sup> day of April 2019**

**Introduction**

[1] This is a contested application brought by the Claimants, a private commercial banking Group ('Choice Banks'), during a major claim against

- [2] Public Bodies (including the Central Bank of Belize and including representatives of the Government of Belize ('GOB') for administrative orders.
- [3] The application is for a principal witness of Choice Banks to provide evidence during the trial by video-link or by any other means deemed suitable by the court, including teleconferencing.
- [4] It concerns the important question, relating to the future direction and use of technology in the courts of Belize, more specifically how the courts ought to consider the exercise of its discretion in considering such fast-developing technological means.
- [5] There appears to be no judicial guidance within Belize as to how such a discretion ought to be exercised and it is hoped by this decision to not only give a decision on the present application but to provide some such guidance in relation to future or outstanding applications.

### **The Court Proceedings**

- [6] On the 3<sup>rd</sup> August 2018 the Choice Banks filed a Fixed Dated Claim Form for Administrative Orders against the Defendants in relation to the latter's revocation of Choice Banks international banking licence.
- [7] The claim is supported by an Affidavit of one Robert Cummings ("RC") the former CEO of the 1<sup>st</sup> Claimant.
- [8] The claim has been extensively case managed.
- [9] The Fixed Date Claim Form was amended on the 5<sup>th</sup> November 2018 and is now seeking the following amended reliefs:
  - a. A Declaration that in deciding to recommend to the Minister that he revoke the Licence, the Central Bank acted in breach of its statutory duties imposed by the IBA.
  - b. A Declaration that in deciding to revoke the Licence, the Minister acted in breach of his statutory duties imposed by the IBA.
  - c. A Declaration that the Minister and the Central Bank, when deciding to recommend the revocation of the Licence and in

deciding to revoke the Licence, failed to exercise their powers to promote the IBA and acted for ulterior or improper purposes.

- d. A Declaration that the decisions of the Central Bank and the Minister were, respectively, unlawful and unconstitutional as being *Ultra vires* the powers conferred on them by the provisions of sections 25 and 27 of the IBA and generally;
  - i. In breach of Choice's right to a fair hearing in that they failed to give Choice an opportunity to explain why the intended decisions were not necessary;
  - ii. Irrational in that in light of the Repayment Plan put forward by Choice the decisions were unnecessary;
  - iii. Disproportionate in the ***de Freitas*** and/or ***Bank Mellat*** sense; and
  - iv. Contrary to sections 3(a) and 6(1) of the Constitution.
- e. A Declaration that the compulsory appointment of a liquidator over Choice by the Central Bank is in breach of sections 3(d) of the Constitution of Belize and is, as a consequence, unlawful and void;
- f. Damages including vindictory damages to reputation.
- g. Costs; and
- h. Such further or other relief as this Court may deem fit.

[10] On the 28<sup>th</sup> January, 2019, RC filed a third Affidavit in reply to Affidavits of Javier Navarro and Kareem Michael. In this Affidavit RC accused Central Bank of "imprudently without regard for the consequences their comments might have" of telling correspondent bank, Bancredito that Choice Bank accused it for the liquidity problems<sup>1</sup>. RC accused the Central Bank's officers of acting in bad faith and of showing that Central Bank had no regard for the well-being of Choice Bank Limited<sup>2</sup>. RC also accused Central Bank of turning Bancredito against the 1<sup>st</sup> Defendant and causing the relationship

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<sup>1</sup> Paragraph 16

<sup>2</sup> Paragraph 17

between 1<sup>st</sup> Defendant and Bancredito to be terminated by the Central Bank giving false information to Bancredito<sup>3</sup>. RC also accused Central Bank in its Affidavit of having “conveniently omitted” certain parts of 1<sup>st</sup> Defendants request” in order to paint a negative picture of Choice and mislead the Court”. Finally RC deposed that on April 12, 2018 he attended a meeting with representatives of Central bank including the Governor at which meeting no objections were raised by Central Bank to the suspension of withdrawals.

- [11] On the 25<sup>th</sup> February 2019 Choice Banks filed an application that:
- (1) RC of 1893-1 South Portage Road, Huntsville, Ontario, P1H2J3, Canada, former Chief Executive Officer of the First Claimant, Choice Bank Limited (“Choice”), be granted permission to provide evidence to the court and to be cross examined by the Defendants/Respondents by video-link or by any other means deemed suitable by the court, including teleconferencing;
  - (2) The costs of this application to be costs in the cause
- [12] The application is therefore that RC be granted permission to provide evidence to the court and to be cross-examined by the Defendants/Respondents by video-link or by any other means deemed suitable by the court, including teleconferencing. The Grounds of the application were stated as follows:
1. RC is not a party to this claim. He is a former employee of the 1<sup>st</sup> Claimant.
  2. RC currently resides outside the jurisdiction in Ontario, Canada. He works in Ontario, Canada and the United Kingdom;
  3. Travel to Belize will have an adverse impact on his work schedule.
  4. RC also has vital and relevant evidence to give and the Claimant’s case is dependent on his evidence being given at trial.

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<sup>3</sup> Paragraph 24

5. RC has received certain information, the details of which he is not able to disclose, which leads him to believe that his personal freedom may be jeopardised if he returns to Belize.
6. The use of video-link or video-conferencing facility for the purpose of giving evidence is an effective means of giving evidence to the Court while allowing the witness in this matter to assist the Court in the conduct of the claim while saving resources and costs.
7. The use of video-link facilities is in the interest of justice and will save cost to the Applicant in the conduct of this matter.

[13] The Application is supported or evidenced by an Affidavit of RC in which the deponent deposed to certain matters some of which critically did not fully substantiate certain material allegations made in the grounds – specifically that the Claimant fears for his personal safety.

[14] On the 8<sup>th</sup> March pursuant to directions given, the Solicitor General filed an Affidavit in opposition to the application for video-link largely containing arguments against the application and otherwise pointing out the unsubstantiated allegations. Kareem Michael also filed an Affidavit on behalf of the Central Bank in opposition to the same application. .

[15] Pursuant to directions given Skeleton Arguments were filed by the Claimants for use of Video-link/Video-conferencing. Skeleton Arguments were also filed by the Defendants in opposition on the 22<sup>nd</sup> March 2019.

[16] On the 25<sup>th</sup> March 2019 the hearing of the application for use of Video-link/Video-conferencing took place and the decision was reserved to 8<sup>th</sup> April 2019.

[17] Further arguments were made by Counsel for the parties on the 8<sup>th</sup> April 2019.

[18] On the 8<sup>th</sup> April 2019 the parties agreed to file further updated Affidavits by 12:30 10<sup>th</sup> April 2019.

[19] On the 10<sup>th</sup> April 2019 the Claimant filed the 3<sup>rd</sup> Affidavit of Irma Leticia Cuello and the Defendants filed the Affidavit of Kareem Michael updating the information of the RC in the 1<sup>st</sup> Claimant.

[20] I am grateful to both Counsel for the helpful assistance in this application which was not without some difficulty.

### **Issues**

[21] Generally how should a court in Belize legally approach the exercise of its discretion when faced with an application for a party to provide evidence at a trial by video-link or by any other means, deemed suitable by the court, including teleconferencing?

[22] Whether in all the facts and circumstances of the case there is sufficient reason given by the witness for the Claimants for the court to exercise a discretion that the witness may give his evidence by use of video conferencing?

[23] Specifically whether it is the interest of justice that the Claimant's principal and critical witness, RC of Huntsville, Ontario, Canada, the former Chief Executive Officer of the 1<sup>st</sup> Claimant should be given permission by the court to give evidence and to be cross examined by the Defendants/Respondents by video-link or by any other means deemed suitable by the court, including teleconferencing?

[24] If a teleconferencing order is to be made what are the appropriate directions which should be given?

[25] Who should pay the costs of this application?

### **Some Relevant Background Facts**

[26] The 1<sup>st</sup> Claimant, which is at present being wound-up, has an authorised share capital of US\$8, 600, 000 consisting of 8,499,900 ordinary shares of US\$1 each (i.e. US\$8,499,900 in ordinary shares), 25,000 special ordinary shares of US\$4 each (i.e. US\$100,000 in special shares) and 100 class 'C' non-voting shares which were reserved for the 'Employee and Executive Officer Share Scheme' of the 1<sup>st</sup> Claimant (i.e. \$100 in 'Class' shares).

[27] RC, currently of 1893-1 South Portage Road, Huntsville, Ontario, P1H2J3, Canada, was the Chief Executive Officer of the 1<sup>st</sup> Claimant from December 20, 2007 until June 29, 2018 when he ceased to occupy this

office after his employment with the 1<sup>st</sup> Claimant was terminated by its Liquidator.

[28] RC is taking part in the present proceedings for administrative orders as the principal witness and as the person who appears to largely be providing the evidential support for the present case. As its past CEO for the 1<sup>st</sup> Claimant, he has sworn most of the Affidavit evidence not only in relation to the Claim but in relation to the application with which this court is now concerned. He therefore is largely providing the evidential backing of the Claimants case and the present application. Although he is not a party to the present claim, his presence in the claim is appears to be that of more than a mere witness. Indeed his evidence might be described as being critical to the Claimant's case.

[29] In his Affidavit evidence, filed in the present Claim on the 28<sup>th</sup> January 2019, on which RC may be extensively cross-examined, he has made significant, even serious allegations against the Central Bank. RC has accused Central Bank of "imprudently without regard for the consequences with its correspondent bank Bancredito, That Choice Bank accused it for its liquidity problems<sup>4</sup>. RC also accused the Central Bank's officers of acting in bad faith and of showing that Central Bank had no regard for the well-being of Choice Bank Limited<sup>5</sup>. RC also accused Central Bank of turning Bancredito against the 1<sup>st</sup> Defendant and causing the relationship between 1<sup>st</sup> Defendant and Bancredito to be terminated by the Central Bank giving false information to Bancredito<sup>6</sup>. RC further accused Central Bank in its Affidavit of having "conveniently omitted" certain parts of 1<sup>st</sup> Defendants request in o" in order to paint a negative picture of Choice and mislead the Court". Finally RC deposed that on April 12, 2018 he attended a meeting with representatives of Central bank including the Governor at

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<sup>4</sup> Paragraph 16

<sup>5</sup> Paragraph 17

<sup>6</sup> Paragraph 24

which meeting no objections were raised by Central Bank to the suspension of withdrawals.

- [30] From June 29, 2018 until February 15, 2019, RC was unemployed, but then on or about this latter date he entered into an exclusive joint venture agreement with certain third parties in which he will be a shareholder in a new company which was formed and in which he has significant executive leadership duties and responsibilities. Under the joint venture agreement, RC is required to complete certain work by specific deadlines and to travel from time to time to the United Kingdom for work-related matters. RC therefore works in a private capacity in various places outside the jurisdiction of Belize.
- [31] It has been alleged by the Defendants that RC is also a shareholder of the 1<sup>st</sup> Claimant. RC apparently, as one of seven senior level employees of 1<sup>st</sup> Claimant, while he was its CEO, in order that their contractual employee bonus entitlement could be paid as dividends, was allotted one non-voting 'C' share pursuant to the 'Employee and Executive Officer Share Scheme'. It is undisputed that he held this single non-voting 'C' share as at April 2, 2018.
- [32] The present holding of this single class 'C' share is disputed on the basis, apparently that each employee who received a non-voting 'C' share was required to sign a blank share transfer instrument in respect of his/her 'C' share which would be effected upon the resignation or termination of employment of the said employee. It is therefore uncertain, so the claimants are suggesting, whether RC at present has any entitlement to the employee share and he might, at best, be entitled to merely the return of US\$1.00 only from the liquidation proceeds. Unpaid bonus entitlement would be due under his contract of employment. RC, so it is alleged by the Claimants, may therefore have no financial interest in any of the reliefs being sought by the Claimants.
- [33] RC deposes that travel to Belize for the trial of the present Claim would cause him to breach this agreement.



- [34] Additionally, RC deposes that he is not prepared to travel to Belize based on certain confidential information that has been provided to him. Also, that travelling to Belize would result in a substantial added costs which, having been unemployed for the past seven months, he cannot afford.
- [35] As a witness RC is likely not compellable to attend at any trial under any rule of court and therefore cannot be ordered to appear at the trial of the present claim.
- [36] RC deposes that the use of the video-link or video-conferencing facility to allow him to assist the court in the conduct of the claim and for the purpose of giving evidence and would be an effective means for him to give evidence to the court without being physically present in the courtroom, while saving resources and costs.
- [37] It appears to be uncontested by the Defendants that RC functions remotely as it is deposed that it does appear that the contractual duties to which he refers in the Joint Venture Agreement may be performed remotely as even while he was employed by the 1<sup>st</sup> Claimant he performed the functions of CEO of the 1<sup>st</sup> Claimant remotely from Canada.

### **The Law**

- [38] The general question of law which has not apparently been addressed within Belize, which arises for determination in this case is how should a court in Belize approach the exercise of its discretion when faced with an application for a party to provide evidence at a trial by video-link or by any other means, deemed suitable by the court, including teleconferencing?
- [39] Rule 1 (1) and (2) of the Supreme Court (Civil Procedure Rules) 2005 (“CPR 2005”) provides:

*“(1) The overriding objective of these Rules is to enable the court to deal with cases justly.*

*(2) Dealing justly with the case includes –*

- (a) *ensuring, so far as is practicable, that the parties are on an equal footing;*
- (b) *saving expense;*
- (c) *dealing with the case in ways which are proportionate to-*
  - (i) *the amount of money involved;*
  - (ii) *the importance of the case;*
  - (iii) *the complexity of the issues; and*
  - (iv) *the financial position of each party;*
- (d) *ensuring that the case is dealt with expeditiously; and*
- (e) *allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”*

[40] Rule 25.1 (k) of CPR 2005 provides that the court must further the overriding objective by actively managing cases, and that this may include making appropriate use of technology.

[41] Rule 29. 2 (1) of CPR 2005 provides:

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

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

[42] Rule 29.3 of CPR 2005 provides that *“The court may allow a witness to give evidence without being present in the courtroom, through a videolink or by any other means”*.

[43] In the UK case of ***Black v Pastouna***<sup>7</sup> in the judgment of Brooke L. J observed that it is incumbent on those advising parties appearing before any court to take all the steps they can in accordance with the overriding objective to reduce the costs of proceedings, including by the use of video link.

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- [44] In the celebrated UK case **Polanski v Conde Nast Publications Ltd**<sup>8</sup> the Claimant had pleaded guilty in a United States court to unlawful sexual intercourse with a 13 year old girl but fled from the United States to France before he was sentenced. Under French law he could not be extradited to the United States. Many years later the Claimant commenced an action in the United Kingdom but feared that if he were to appear in the United Kingdom for trial he would be arrested and extradited to the United States. The Claimant applied for leave to give evidence by video link from France pursuant to the English CPR r. 32.3. This English rule is similar to our Rule 29.3. But unlike the situation in Belize there were and are practice directions which regulated the implementation of these rules.
- [45] The trial judge, Eady J observing that the reason underlying the application was unattractive, nevertheless considered that this did not justify depriving Mr Polanski of his chance to have his case heard at trial. The Court of Appeal, comprising Simon Brown, Jonathan Parker and Thomas LJ, on appeal overturned the trial judge's order and discharged it, noting that the general policy of the courts should be to discourage litigants from escaping the normal processes of the law rather than to facilitate this and determined that the trial judge's order overlooked and undermined this policy and he concluded that the Claimant should not be allowed to give evidence by video conference.
- [46] On appeal to the English final appellate court, the House of Lords, in a divided decision, by a three to two, this influential court authoritatively held that the Claimant was entitled to commence proceedings in England to protect his civil rights notwithstanding that he was a fugitive from justice. Further, it was held that there was a strong public interest in allowing a claim properly brought in England to be properly and fairly litigated. The Court found that as a general rule, where proceedings were properly brought in England a Claimant's unwillingness to visit England because he

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<sup>8</sup> [2005] UKHL 10 [Tab 1]

was a fugitive was a valid and could be a sufficient reason for making a video link order.

[47] In the course of delivering the leading judgment in the House of Lords, Lord Nicholls of Birkenhead identified the issue for determination as being: whether the administration of justice would be brought into disrepute if the judge's order were allowed to stand.

[48] In deciding this issue Lord Nicholls considered the question for determination under three separate headings (a) the parties interests, (b) the public interest in the administration of justice, and (c) fugitives from justice.

[49] Under 'the parties interests' Lord Nicholls had this to say:

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

*[14] Condé Nast does not suggest otherwise. Improvements in technology enable Mr Polanski's evidence to be tested as adequately if given by VCF as it could be if given in court. Eady J, an experienced judge, said that cross-examination takes place "as naturally and freely as when a witness is present in the courtroom". Thomas LJ said that in his recent experience as a trial judge, giving evidence by VCF is a "readily acceptable alternative" to giving evidence in person*

*and an "entirely satisfactory means of giving evidence" if there is sufficient reason for departing from the normal rule that witnesses give evidence in person before the court: [2004] 1 WLR 387, 402. Whether Mr Polanski's reason is sufficient is the all-important question to which I shall return.*

*[15] Thirdly, if a VCF order is refused, Mr Polanski will be gravely handicapped in the conduct of these proceedings. In practice he will either abandon his action or, possibly, continue but under the serious disadvantage that his oral evidence on the crucial dispute of fact, concerning what took place at the restaurant, will not be placed before the jury. Either way, in its conduct of this litigation Condé Nast will receive an unjustified windfall at the expense of Mr Polanski. Condé Nast will find itself in the fortunate position of not being called to account for having published what may be a serious libel."*

[50] Under 'the public interest in the administration of justice' Lord Nicholls had this to say:

*".....the courts increasingly recognise the need for proportionality. The sanction must be appropriate having regard to all the circumstances. Indeed, an over-rigid interpretation of the requirements of public policy in this field may be counter-productive. A legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the law into disrepute. It may also involve a breach of the parties' rights .....[as for example under the Constitution]."*

[51] Under 'fugitives from justice' Lord Nicholls had this to say:

*" [21] These questions did not arise in past years. In the past oral evidence required physical presence. But recent*

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

**[22]** *There are three possible answers on this issue. They may be broadly summarised as follows: (1) as a general rule a fugitive's unwillingness to return to the jurisdiction of this country is a valid reason, and can be a sufficient reason, for making a VCF order; (2) as a general rule a fugitive's unwillingness to return is not a valid reason for making a VCF order; and (3) there is no general rule: everything depends on the circumstances.*

**[23]** *Possibility (3) is not attractive. That would leave at large the answer to the question of legal policy raised by this appeal. That would not be satisfactory. The fugitive's reason for seeking a VCF order must, as a matter of legal policy, either be acceptable in principle or not. The House must give guidance on this issue. So the choice lies between answers (1) and (2).*

.....

**[27]** *Thirdly, a direction that a fugitive such as Mr Polanski may give his evidence by use of video conferencing is a departure from the normal way a claimant gives evidence in this type of case. But the extent of this departure from the normal should not be exaggerated. It is expressly sanctioned by the Civil Procedure Rules. The power conferred by the rules is intended to be exercised whenever justice so requires. Seeking a VCF order is not seeking an "indulgence".*

.....

**[31]** ..... But overall the matter which weighs most with me is this. Despite his fugitive status, a fugitive from justice is entitled to invoke the assistance of the court and its procedures in protection of his civil rights. He can bring or defend proceedings even though he is, and remains, a fugitive. If the administration of justice is not brought into disrepute by a fugitive's ability to have recourse to the court to protect his civil rights even though he is and remains a fugitive, it is difficult to see why the administration of justice should be regarded as brought into disrepute by permitting the fugitive to have recourse to one of the court's current procedures which will enable him in a particular case to pursue his proceedings while remaining a fugitive. To regard the one as acceptable and the other as not smacks of inconsistency. If a fugitive is entitled to bring his proceedings in this country there can be little rhyme or reason in withholding from him a procedural facility flowing from a modern technological development which is now readily available to all litigants. For obvious reasons, it is not a facility claimants normally seek to use, but it is available to them. To withhold this facility from a fugitive would be to penalise him because of his status.

**[32]** That would lack coherence. It would be to give with one hand and take away with the other: a fugitive may bring proceedings here, but his position as a fugitive will tell against him when the court is exercising its discretionary powers. It would also be arbitrary in its practical effect today. A fugitive may bring proceedings here but not if it should chance that his own oral evidence is needed. Then, despite the current availability of VCF, he cannot use that facility and a civil wrong suffered by him will pass unremedied.

*[33] For this reason I consider the judge was entitled and, indeed, right to exercise his discretion as he did. Rowland v Bock [2002] EWHC 692 (QB), [2002] 4 All ER 370 was correctly decided. There Newman J made a VCF order in respect of a claimant who risked arrest and extradition to the USA on charges of fraud. No doubt special cases may arise. But the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, for making a VCF order. I respectfully consider the Court of Appeal fell into error by having insufficient regard to Mr Polanski's right to bring these proceedings in this country even though he is and will continue to be a fugitive from justice.*

*[34] I would allow this appeal and restore the judge's order. Mr Polanski was convicted of a serious crime. His reluctance to return to this country is grounded in a fear that he may be extradited and receive a custodial sentence in California. That does not take the case out of the general rule. However, at the trial the jury will be told these facts and will take them into account on all issues to which they are relevant.”*

[52] Lord Hope of Craighead added to the reasons of Lord Nicholls, by stating in his opinion as follows:

*“[65] This brings me to what I see as the critical factor. It is the factor that leaves me in no doubt that the general rule should be that the fugitive's unwillingness to come to this country is not in itself a reason for refusing to allow his evidence to be given through a video conference link. This is that the granting or refusing of the order will have no effect whatever on the claimant's continued status as a fugitive. The granting of the*



*order will not help him to escape from the normal processes of the law, nor will declining to grant the order do anything to assist them. This is because he is already beyond the reach of those processes. So long as the claimant remains where he is, and irrespective of whether or not the order is made, those processes will be incapable of reaching him if he is a member of that class of fugitives that cannot be extradited.*

**[66]** *.... His reason for asking for the order to be made is so that he can give evidence in a case where, leaving aside issues of public policy, he has a legitimate interest in doing so. The effect of refusing the order will not be to assist the normal processes of the law. Its only effect will be to deny him access to justice. I think that Eady J was right to see this as the crucial point which justified the making of the order in his case. But now that we are looking for a general rule, I would hold that the Appellant's case falls within the generality of cases where the fact that the claimant wishes to remain outside the United Kingdom 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 VCF.*

.....

**[68]** *The Appellant has made it clear that he would be willing to make himself available for cross-examination by VCR if his request that he should be allowed to give his evidence by this means were to be refused on grounds of public policy. Eady J tells us that in his experience the process of cross-examination in this way takes place as naturally and freely as when a witness is in the courtroom. So it cannot be said that the Appellant was seeking to obtain a tactical advantage by offering himself for cross-examination by this means.....”*

[53] Baroness Hale also added to the reasons of Lord Nicholls, by opining as follows:

*“[69] I agree, for all the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead that this appeal should be allowed and the judge's order restored. In brief:*

*1. ...*

*2. ....*

*3.....*

*4. If this were almost any other cause of action, I venture to think that the outcome would not be in doubt. Suppose, for example, that the Appellant had suffered personal injuries while in transit from the US to France and his evidence was necessary to prove either the circumstances of the accident or the extent of his injuries: would we hesitate to allow it to be given by VCF? Suppose, perhaps more plausibly, that there were a dispute about whether the Appellant had intellectual property rights in one of his films which is distributed or marketed here: would we hesitate to allow his evidence to be given by VCF? It should not make a difference that the right in question is the right to such reputation as he has, rather than a right to bodily integrity or a right to property. That reputation was attacked in an English language publication and is most appropriately defended in an English language jurisdiction.*

*5. Generally, therefore, I agree that this should be an acceptable reason for seeking a VCF order, although there may be cases in which the affront to the public conscience is so great that it will not be a sufficient reason. This is not such a case.*

.....

**[80]** .....the Civil Procedure Rules 1998 are part of a new approach to civil litigation in this country. The court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. The court is to be trusted to evaluate the weight of the relevant evidence for itself. The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as VCF is not a revolutionary departure from the norm to be kept strictly in check but simply another tool for securing effective access to justice for everyone. If we had a rule that people such as the Appellant were not entitled to access to justice at all, then of course that tool should be denied him. But we do not and it should not.”

- [54] The liberal approach of the Courts in granting videoconferencing orders was also seen in **Rowland v Bock**<sup>9</sup>. In this case the lower court had
- (a) placed a very heavy burden on the Applicant to show that it was just for him not to attend trial.
  - (b) found that orders to provide evidence by video link should only be made in cases where it is shown that there is a “*pressing need for an order, for example, if a witness is too ill to attend in person*”: (para. 6).
  - (c) found this rule particularly important where the witness was the claimant himself and his evidence would be crucial in determining the issues.

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<sup>9</sup> [2002] 4 All ER 370 [Tab 2]

[55] In allowing the appeal Mr. Justice Newman stated at para. 9, *inter alia*, that the lower court:

*“...failed to pay sufficient regard to the recognition accorded by the Code to video link evidence. His conclusion that it should be ordered in cases of ‘pressing need’, where a witness is ‘too ill to attend’, is too restrictive and conflicts with the broad and flexible purpose of the Code which is directed to the objective of enabling the Court to do justice. No defined limit or set of circumstances should be placed upon the discretionary exercise to permit video link evidence. A refusal to attend which could be characterized as an abuse or contemptuous, or which sought to obtain a collateral advantage, could be envisaged as putting the application beyond a favourable exercise of discretion, but rules 1.1 and 1.4, envisages considerations of costs, time, inconvenience and so forth as being relevant considerations;”*

[56] Mr. Justice Newman also recognized that rather than being put at a disadvantage, the party who gives live evidence is put at an advantage.

[57] The use of video link evidence was also approved in ***Attorney General of Zambia v Meer Care & Desai & Ors***<sup>10</sup> which was a claim brought by the AG of Zambia against 20 defendant to recover government moneys said to have been misappropriated between 1996 and 2002. There was a trial which was to take place in England at which, because of the conditions of bail in Zambia, certain Defendants could not attend in England. The Judge ordered that the Defendants could attend via video link. This order went to appeal and was heard by the Court of Appeal which included the Master of the Rolls Sir Anthony Clarke who delivered the leading judgment of the court. He held that evidence given either by video or on commission in Zambia is consistent and not inconsistent with a fair trial. While accepting

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<sup>10</sup> [2006] EWCA Civ 390 (CA) [Tab 3]

that it would be preferable to have the whole trial, including all the evidence in England, that in balancing the interests of all the parties and the interests of justice he would not interfere with the lower courts order that evidence could be given video link which the court considered was “*becoming more common, perhaps as the links become more reliable*”. In reaching this conclusion the Master of the Rolls tried to step back from the detail of this unusual case and to reach a conclusion as to whether there was a risk that if the trial process as contemplated by the judge there is any significant risk of the appellants not receiving a fair trial. He concluded that there was not.

[58] The Jamaican Court of Appeal in the case of **Estate Lascelles Samuel Panton v. Sun Development Limited**<sup>11</sup> opined upon rules in the Jamaican Civil Procedure Rules the latter being the same as in Belize’s Rule **29. 2 (1)**. It is a 2009 unanimous decision of the court in relation to a dispute between 3 brothers concerning the estate of their father. The Appellant was a party to the proceedings being the Executor of the estate and was contending that certain properties was transferred to one Donald Panton pursuant to certain arrangements between them and was subsequently transferred to the name of the Respondent in which the subject deceased had no known interest and of which a brother of the executor, the critical witness at the trial, Errol Panton, was allegedly a director, and wished to testify by way of video link to the Jamaican Supreme Court from the USA.

[59] The witness deposed that because of serious and irreconcilable difference between himself and his brother in relation to the estate, he feared that he would be exposed to risk of injury and harm if he traveled to Jamaica, and that such travel would cause great inconvenience, expense and dislocation to him which could be avoided by, without detriment to the trial process if he were permitted to give evidence by video link which he has already successfully done in the proceedings. There were, however, subsequently

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<sup>11</sup> Civil Appeal No. 25/2009

and occasional difficulties, during the mediation process, with the video link, but nevertheless the mediation process was successfully completed in terms of a resolution between the parties.

- [60] The evidence of the basis of the fears expressed by the witness was contested by the other side. It was also contested that the video link was good both at the trial and during the mediation session the latter posing significant difficulties. Complaint was also made during the mediation session of the witnesses' behaviour. It was also suggested by the respondents that the matter would involve a large number of documents which would make cross-examination difficult and that there was no difficulty for the witness to attend the trial in person.
- [61] The trial judge ruled that the evidence of the witness was to be given by video link subject to certain directions relating to the conduct of setting up and the place from which the video link would take place.
- [62] The court of appeal was concerned that there was not a written judgment of the High Court and the reasons for the giving of the order.
- [63] The issue for determination of the court was expressed to be whether the discretion exercised by the court below ought to be disturbed.
- [64] The Court of Appeal expressly placing reliance on the UK case of *Polanski v Conde Nast Publications Ltd* which upon which a similar rule in both Jamaica and Belize are based or modeled but, in both the case of Jamaica and Belize, unlike the situation in England, there are no Practice Directions in existence.
- [65] The Court of Appeal nevertheless accepted that the issues in the **Polanski case** contained useful considerations in resolving the issues in the Jamaican appeal.
- [66] The Judgment of the Court of Appeal in Jamaica considered the critical question for determination in the case before it to be whether there were sufficient reason for departing from the general rule that a witness should be present in court when giving evidence.

- [67] The Court of Appeal of Jamaica, in considering the grounds of appeal felt that the following grounds go to the heart of the appeal:
- (a) That orders for evidence from abroad should be made only where there is good reason for evidence to be given otherwise by oral evidence given in public.
  - (b) The fear that the witness expressed that he would be exposed to injury and harm from his brothers with whom he had a dispute; and whether there was evidence before the court of any previous threat or physical assault on the witness.
  - (c) There was also unchallenged evidence that the witness during the mediation exercise conducted himself in a reprehensible manner. That he made scurrilous remarks against other persons and used indecent language and was not properly under the control of the trial judge.
- [68] Generally the Court of Appeal felt that there was no substance in the bald complaint that the Applicant felt exposed and harboured fears for his personal safety because of the tremendous animosity which his brothers held toward him. The court considered that the witness had not established any evidential basis on which it could be demonstrated that his fear of physical harm is honest and genuine and also considered that there was no evidential basis with the court to substantiate the allegation of dislocation. The Court expressed the expectation that there should have been a demonstration as to how his life and business interests would be dislocated, which in its views, they felt there were none. The court considered that it was simply a matter of convenience which it considered was not to dictate the use of this procedure. The Court of Appeal felt that litigants with deep pockets, such as the Applicant, should not for that reason dictate the use of a video conference link.
- [69] The Court of Appeal also accepted that there was also unchallenged evidence that the witness during the mediation exercise conducted himself in a reprehensible manner and that he made scurrilous allegations against

other persons and used indecent language and was not properly under the control of the trial judge. The court of appeal considered that the signs portended that the trial would be vigorous with the seething animosity between the Panton brother erupting during the trial with the need for the trial judge having a present and immediate control of all the witnesses; and that any sanctions which may be employed may be ineffectual in respect of a witness giving evidence at a remote site which would detract from the efficiency of the trial.

[70] The Jamaica Court of Appeal therefore felt compelled to disturb the discretion exercised by the court below as the latter had not properly analysed the evidence pertaining to the issue before it and opined that there was no sufficient reason to depart from the general rule that a witness should attend in person to give evidence.

[71] This court is of the view that Improvements in technology are better enabling witness's evidence to be tested as adequately when given by video link as it could be if given in court. It is the view of this court, moreover, as expressed by Eddy J in the Polanski Case, that cross-examination can take place *"as naturally and freely as when a witness is present in the courtroom"*. Also that similar to the views of Thomas LJ, *"that in his recent experience as a trial judge, giving evidence by VCF is a "readily acceptable alternative" to giving evidence in person and an "entirely satisfactory means of giving evidence"*. As a result the technology and the evidence to establish the sufficiency of the reason for departing from the normal rule (that witnesses give evidence in person before the court) since the earlier decisions, may have shifted in favour of using videoconferencing facilities. But the all-important question to which this court should give consideration still remains: whether the reason which the applicants have given for a videoconferencing order is indeed sufficient.

[72] The determination of the question which this court has to consider, is still whether, if a videoconferencing order is refused, the Claimant's case will be gravely handicapped in the conduct of the proceedings in question. This



court, in this regard, accepts that in practice the challenge to a videoconferencing order may be used to cause a party, in this case the Claimants, to either abandon their claim or, possibly, continue but under the serious disadvantage that critical oral evidence on what may be a crucial dispute of fact, concerning important facts in issue, will not be placed before the Judge. In this regard the court will have to weigh the fact that either way, in its conduct of the litigation, that the party contesting the use of video conferencing facilities may receive an unjustified windfall at the expense of the other party resulting in such other party finding itself in the fortunate position of not being called to account for matters which are the subject matter of the litigation.

[73] In relation to the 'the public interest in the administration of justice' this court is in agreement with Lord Nicholls in the Polanski Case that the unfair consequences of this kind, prejudicial to one party and correspondingly beneficial to the other, are not unusual when questions of "public policy" arise. But that public policy is based on wider considerations than the interests of the parties themselves. But this does not mean that the consequences for the parties are irrelevant when considering wider questions of public policy. On the contrary this court is of the view that consequences for the parties may indeed be of relevance and importance, including in the present case. They are one of the factors the court will take into account when deciding whether a video conferencing order in respect of a witness's evidence would bring the administration of justice into question or even disrepute.

[74] This court has therefore to look broadly at the requirements of justice. This means that this court has to recognise the need for proportionality. The refusal of a video conferencing order must be appropriate having regard to all the circumstances without an over-rigid interpretation of the requirements of public policy in this field which may be counter-productive. Any application of a legal principle based on public policy which ignores the consequences for the parties can itself bring the administration of the

law into question or even into disrepute. It may for instance involve a breach of the parties' rights such as for example involving administrative orders including questions involving or under the Constitution of Belize.

[75] This court considers that the facts of the present case does not present as hard as case for determination as the **Polanski case**. It does not involve the difficult legal and ethical situation for this court to which questions relating to 'fugitives from justice' gave rise and which likely caused the division of opinion among the Judges in the Polanski Case. Neither does it give rise to the same factual issues involved in the Jamaican case of **Estate Lascelles Samuel Panton v Sun Development Limited**<sup>12</sup> which led to a unanimous decision of the Jamaican Court of Appeal. But even in the Polanski Case the House of Lords resolved the issue in the applicant's favour (albeit in a divided court) involving a fugitive from justice where it was determined in favour of the fugitive from justice, in which it was held by the Judge delivering the leading decision of the court, that

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

.....

*But the general rule should be that in respect of proceedings properly brought in this country, a claimant's unwillingness to come to this country because he is a fugitive from justice is a valid reason, and can be a sufficient reason, for making a VCF order. I respectfully consider the Court of Appeal fell into error*

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<sup>12</sup> Supreme Court Civil Appeal No. 25/2009

*by having insufficient regard to Mr Polanski's right to bring these proceedings in this country even though he is and will continue to be a fugitive from justice.*

[76] Lord Hope of Craighead added to the reasons of Lord Nicholls, by stating as opining as follows:

*“[65] This brings me to what I see as the critical factor. It is the factor that leaves me in no doubt that the general rule should be that the fugitive's unwillingness to come to this country is not in itself a reason for refusing to allow his evidence to be given through a video conference link. This is that the granting or refusing of the order will have no effect whatever on the claimant's continued status as a fugitive. The granting of the order will not help him to escape from the normal processes of the law, nor will declining to grant the order do anything to assist them. This is because he is already beyond the reach of those processes. So long as the claimant remains where he is, and irrespective of whether or not the order is made, those processes will be incapable of reaching him if he is a member of that class of fugitives that cannot be extradited.”*

[77] This court is of the view that where a witness is unwilling to come to Belize to attend a trial to give evidence the reason for asking for the video conferencing order has to be examined which then court has to consider before determining if it is reasonable for a teleconferencing order to be made.

[78] The situation in the present case raises slightly different and somewhat more nuanced considerations to the reasons why a Claimant, or a person having a significant interest in a Claimant, may be unwilling to attend a court in Belize to give evidence and be cross-examined. This court considers that the standard which is applicable in examining the reasonableness of the witness's unwillingness, as opposed to a Claimant's unwillingness to attend court in person, may be looked at in a somewhat

less strict way. This is especially the case where the witness may not have any obvious interest or direct benefit to obtain from the proceedings, and particularly where the witness is otherwise not compellable by any judicial process to attend a trial to give evidence, but is otherwise willing to testify by using a videoconferencing facility. Also slightly different consideration may apply where the effect of refusing the order may not be to assist the normal processes of the law, but the only effect might be to deny the Claimant access to justice. In this latter case, such a situation may be the crucial point which may justified the making of the order in the case, which this court considers may well be the case given the facts and circumstances which has come to its attention.

[79] Thus where the Claimant's witness falls within the generality of cases where it is established as a fact that the witness is or may likely be unwilling to attend Belize, and the court, to give evidence, and, he wishes to remain outside of Belize, even for his own personal or private reasons, or even where the witnesses expresses in a clear and convincing way that he is not prepared to travel to Belize because of personal or other reasons, (such as his inability to afford the time or the costs of such travel) and there are no other countervailing factors operating, that this may be a sufficient reason for allowing the witness to give his evidence from abroad. In such a situation as has just been described this court considers that such a situation may indeed be sufficient reasons or provide sufficient grounds for allowing the witness to remain abroad and give his/her evidence by video conferencing.

[80] Thus where the witness, who is not compellable, has made it clear that s/he would only be willing to make him/herself available for cross-examination by a video conferencing order and the court is satisfied that in its experience the process of cross-examination in this way can take place as naturally and freely as when a witness is in the courtroom, it cannot then be said that the Claimant is seeking to obtain a tactical advantage by the witness offering himself for cross-examination by this

means. Indeed this court considers that the disadvantage may be flowing towards, and therefore against, the witness. In such a circumstance any objection to the witness giving evidence by a teleconferencing order on grounds of public policy, if upheld, would therefore not have justified the sanction of excluding the critical evidence. This is clearly an indication that the interests of justice might be better served in such a case by allowing the witness to give his/her evidence by a video conferencing order which is being sought.

- [81] Active case management under CPR includes making use of technology. A witness who is abroad and who is prepared to give evidence but unwilling to attend in Belize ought to be looked upon more favourably than a Claimant's reasons for being unwilling to attend the court in proceedings. The reason for this is that a Claimant is the reason why the Defendant is in court, they have initiated and brought the defendant to court, and as such a witness ought more readily to be allowed to testify and be cross-examined via video link.
- [82] The rule makes it clear that the court's permission is required before evidence can be given by this method and certainly in the case of a witness the importance of the rule, reposing a discretion in the court, is to ensure that appropriate facilities are in place within the Court and that administrative arrangements need to be made in advance.
- [83] The court undoubtedly has a discretion in exercising its case management powers, whether to allow evidence by this method. Although evidence given via video link may be convenient for the witness and save costs, the court may or may not have the facilities in place and depending on the circumstances of the case it may not be as good as having the witness physically present in the witness box to give his evidence. It all depends on the technological situation of the court, the circumstances of the case and how the trial judge projects the direction which the case is likely take as well as how he or she wishes to manage the case to take into account any projected difficulties. Therefore, the mere convenience of the witness

should not be allowed to dictate the court's decision to use videoconferencing facilities, and the court should still ask itself whether its use will be beneficial to the efficient, fair and economic disposal of the litigation.

- [84] This court accepts that a judge may refuse to allow a crucial witness to give evidence by this method if his/her evidence is likely to be lengthy and involve multiple references to the court bundles which could not, by appropriate directions, be properly managed. It is for the court to be satisfied, given the facts and nature of the case that it could manage the case by means of a video conferencing order and with practical directions in order to achieve the objective of making the video link session resemble the usual procedure when evidence is given in court.
- [85] It is the duty of the Attorney for the party who wishes to make use of this technology to ensure that the communication link has been established and that it will work on the day allocated for the witness to give evidence. In the event that there are difficulties then such an Attorney will have to appreciate that the risk attendant on having to rely on a witness who is giving his/her evidence remotely, is a risk which the Attorney and their client will ultimately have to bear, and that a communication failure may be tantamount to a witness failing to attend trial in person.
- [86] It has been held that it is not appropriate for a witness to give evidence by Skype, as this is not a link that commends itself to the court environment. That there may be inherent problems with any free service which could be eliminated or reduced by utilising a paid service. This is a matter for appropriate case management directions. Also, it has been said, in some courts it is not everyone within the court that may see the picture or video of the person testifying, and that not in every court there are facilities for the oral evidence to be recorded and there may be other known security risks which may arise. All of such considerations within the court the trial judge will have to take into account in managing the case and deciding

whether to exercise his/her discretion in making a video conferencing order.

[87] It is hoped by the previous discussion that some of the important concerns and questions, relating to the future direction and use of technology in the courts of Belize, have been raised and considered. More specifically it is hoped that some of the questions raised will be considered by the parties and the courts in the Court exercising its discretion its discretion in considering the use of such a fast-developing technological facility and aid to the justice system, and, where an order is made that appropriate directions can be considered and made to ensure a beneficial, efficient, fair and economic disposal of the litigation.

**Whether in all the facts and circumstances of the case, in the interest of justice, there is sufficient reason given by the witness for the Claimants for the court to exercise its discretion, to make a teleconferencing Order?**

Facts

[88] This court is considering the facts of the case on the following bases:

- (a) The 1<sup>st</sup> Claimant is at present being wound-up.
- (b) RC's employment with the 1<sup>st</sup> Defendant was terminated by its present Liquidator on June 29, 2018.
- (c) RC is only entitled to the paid-up capital for the said share and arrears of employee bonus payment, if any, having no entitlement to share in the assets of the company.
- (d) Unpaid bonus entitlement is likely due under his contract of employment, But RC may otherwise have no significant financial interest in the relief being sought by the Claimants.
- (e) RC is a witness, albeit not entirely disinterested, for the Claimants and therefore is not a party in this matter.
- (f) RC is likely not compellable to attend as a witness at any trial under any rule of court.

- (g) RC deposes, which this court accepts, that travel to Belize for the trial would cause him to breach this agreement.
- (h) Since February 15, 2019, RC entered into an exclusive joint venture agreement with certain third parties in which he will be a shareholder in a new company which was formed and to have significant executive leadership duties and responsibilities. Under the joint venture agreement, RC is required to complete certain work by specific deadlines and to travel to the United Kingdom for work-related matters.
- (i) RC deposes that travel to Belize for the trial would cause him to breach this agreement.
- (j) RC is not prepared to travel to Belize based on information received by him and would result in a substantial added costs which, having been unemployed for the past seven months, he cannot afford.
- (k) The use of the video-link or video-conferencing facility for the purpose of giving evidence would be an effective means of giving evidence to the court while allowing him to assist the court in the conduct of the claim while saving resources and costs.
- (l) RC is in the habit of functioning remotely.

### Submissions

[89] The Claimants submit that the cases show that the use of videoconferencing is not restricted to cases in which the witness is seriously ill or cases of pressing need. The courts will adopt a broad and flexible approach so as to do justice between the parties.

[90] Also submitted by the Claimants is that they have provided sufficient reasons for the exercise of the Court's discretion. That RC is not a party to the claim and he does not stand to benefit from the relief sought. That he has vital and relevant evidence to give and the Claimants' case is dependent on his evidence being given at trial. That he resides and works outside the jurisdiction and that travel to Belize will adversely affect his



ability to meet work obligations. Further that he is unable to meet the expense of traveling to Belize for the trial in view of the loss of income caused by the termination of his employment by the Liquidator of the 1<sup>st</sup> Claimant. Also that he believes that his personal freedom may be jeopardized if he returns to Belize.

- [91] It is further submitted that the Claimants' case would be severely prejudiced if the order is not granted as RC, who cannot be compelled to attend trial in Belize, is the Claimants principal witness and whose evidence is crucial to provide to the Court.
- [92] It is submitted by the Defendants that for the Court to exercise its discretion to permit a deviation from this general rule, a witness is required to provide credible and salient reasons why the rule should not be followed. That as such the provision of evidence via video link is not an automatic right of any Applicant and the Applicant is duty bound to provide sufficient evidence to the Court that would justify the exercise of the Court's discretion to permit evidence via video link.
- [93] It has also been submitted by the Defendants that RC's deposition has not provided the Court with any information as to why travel to Belize would cause him to breach his alleged agreement with "certain third parties." Also that upon review of the contract which RC has with third parties it does appear that the contractual duties to which he refers may be performed remotely, either from Canada or Belize. Also that during the time that RC performed the functions of Chief Executive Officer of the 1<sup>st</sup> Claimant he did so remotely from Canada. As a result RC would not likely suffer any prejudice relative to his contractual duties if he is required to travel to Belize for the purpose of providing vital testimony in person which testimony would not require his presence in Belize for more than one day and that there are currently direct flights from Canada, where he resides, to Belize, and that as such RC would not suffer any significant loss in time by reason of his travel to Belize.

- [94] It has also been observed that RC has provided no evidence of any impending travel to the United Kingdom during the period that the instant matter is set for trial or any deadlines which he has in relation to the contract during the period that the instant matter is set for trial.
- [95] The Defendants rely on their observation that RC's remark that "I am not prepared to travel to Belize based on certain confidential information that has been provided to me" is unsupported by any explanation of the nature or content of the confidential information which he has allegedly received nor has he given any indication of the reasons why that confidential information would have any bearing on his preparedness to travel to Belize. That as such any such suggestion amounts to a mere allegation insufficient or not providing a credible basis on which the Court ought to rule in favour of permitting the Application to provide evidence by Video-Link.

#### Determination

- [96] Having carefully considered the relevant facts, in the context of the controlling law this court is in agreement with the views expressed by Baroness Hale that it cannot see that

*"...as between the parties to this action the Defendant[s] will suffer any prejudice from the Claimant's evidence being given in this way. This court is of the view that the Civil Procedure Rules are part of a new approach to civil litigation in this country where the court is in charge of how the dispute which the parties have put before it is to be decided. Technicalities which prevent the court from getting the best picture it can of the case are so far as possible to be avoided. The court is to be trusted to evaluate the weight of the relevant evidence for itself. The evidence is to be given in the most efficient and economical way consistent with the object of doing justice between the parties. New technology such as video conferencing not a revolutionary departure from the norm to*

*be kept strictly in check but is simply another tool for securing effective access to justice for everyone.”*

- [97] This court, following the UK House of Lords decision in **the case of Polanski**, that the Claimants are entitled to commence proceedings in Belize for administrative orders to protect their civil rights. This is so even if their principal witness, RC is a fugitive from justice, which he is not. This court considers that there is a strong public interest in allowing a claim properly brought in Belize, to be properly and fairly litigated. As such, as a general rule, on the facts and circumstances of the present case that this is a valid and could be a sufficient reason for making a video conferencing order.
- [98] This court accepts that the provision of evidence via video link is not an automatic right of any Applicant and the Applicant is duty bound to provide sufficient evidence to the Court that would justify the exercise of the Court's discretion to permit evidence via video link.
- [99] This court after careful reflection has on balance concluded that it is satisfied that that the Claimants have presented to the court, for the Court to exercise its discretion to permit a deviation from the general rule, credible and salient reasons why the general rule should not be followed. The witness it would appear, apart from vindicating his professional integrity as CEO of the 1<sup>st</sup> Claimant, does not appear to have any obvious reason to inconvenience himself or to place himself at the disposal of the Claimants, by attending in Belize to give evidence and to be cross-examined. He has already deposed that he is not prepared to travel to Belize if he is not able to give evidence by video-link or video-conferencing facility. He is not compellable by this court to attend. He appears to be the critical witness for the Claimants. It appears that if he does not give evidence by video-link the Claimants case will collapse. The Claimants do not appear to have any control or power over the witness.

- [100] It is accepted by this court that RC's deposition could have been stronger but nevertheless the court also accepts that the evidence is as it is, and somehow has a ring of truth about it.
- [101] The Court also accepts that the Applicant would certainly have provided a stronger basis on which to make a teleconferencing order if RC had provided the Court with additional information as to why travel to Belize would cause him to breach his agreement with "certain third parties." It is also accepted that upon review of the contract which RC has with third parties that it does appear that the contractual duties to which he refers may be performed remotely, either from Canada or Belize. But on the other hand RC has deposed that under the joint venture agreement he is required to complete certain work by specific deadlines and to travel to the UK for work-related matters. This is a little vague but he does clearly depose that travel to Belize for the trial would cause him to breach this agreement. It is also clear that RC is not wanting to reveal the substance of his arrangement with the third party and to keep his arrangement fairly confidential – that is his right. He is merely a witness, albeit a crucial one, who is somewhat involved in the proceedings.
- [102] The suggestion that RC performed the functions of Chief Executive Officer of the 1<sup>st</sup> Claimant remotely from Canada does cut both ways, in the view of the court, as it certainly suggests that testifying remotely by video conferencing may not be a mode of operating with which he is unfamiliar.
- [103] The question is not, as suggested by the Defendants, whether RC would likely suffer any prejudice relative to his contractual duties if he is required to travel to Belize for the purpose of providing vital testimony in person. He has already deposed that, as a witness, he is not prepared to travel to Belize. The appropriate question is whether the Claimant's would suffer prejudice if RC is not able to provide the testimony if an order is made that he has to attend in Belize to give evidence and to be cross-examined.
- [104] This court also accepts that RC's Affidavit is unsupported by any explanation of the nature or content of the confidential information which he

has allegedly received; and nor has he given any indication of the reasons why that confidential information would have any bearing on his preparedness to travel to Belize. This court considers his statement as a clear declaration of his intention, and it is not a mere and insufficient allegation. The Court considers such a clear declaration as sufficient evidence of his intention which this court has no reason to believe is not credible; and based upon such a clear and credible intention, this court considers that it ought to rule in favour of permitting the Application to provide evidence by Video-Link.

**Whether it is the interest of justice that the Claimant's witness, Robert Cummings, should be given permission by the court to give evidence by video-link etc.?**

Submissions

[105] It is submitted by the Claimants that Rules 29.2 and 29.3 of the Supreme Court (Civil Procedure) Rules, 2005 (the CPR) provide wide scope to the Court for the granting of orders that evidence be provided by video link

[106] It is further submitted that the Claimants' case would be severely prejudiced if the order is not granted as RC, who cannot be compelled to attend trial in Belize, is the Claimants principal witness and whose evidence is crucial to provide to the Court.

Determination

[107] This court accepts that any decision in this case would have implications on the financial and regulatory sector of Belize but this court considers that to allow the witness to testify via video conferencing would ensure that both parties are on more or less an equal footing. This is because the Claimants are, if anything, at a disadvantage by not having his witness present in court and the Claimants are therefore not seeking an advantage by their witness providing evidence remotely.

[108] This court has had significant experience in managing witnesses who gives evidence remotely by video conferencing and has not had any significant

problem with its use. If there are any such problems then this will ultimately inure against the Claimants' case and not in their favour. This court has actually in the past had the experience of Counsel cross-examining witnesses from a remote location and has not found this problematic. Indeed this court has quite satisfactorily managed difficult witnesses from remote locations and has had no difficulty in handling such witnesses. Much of the anticipated difficulty could be managed by providing appropriate and clear directions in advance to anticipate any difficulty.

[109] The Court accepts that the present dispute is one involving the public interest in which RC has made grave and contested allegations against the Central Bank of Belize and the Minister of Finance of Belize; and in which he is not only an important but a crucial witness upon which the Claimants' case rests. That the case involves highly disputed matters the credibility of which has to be tested by cross-examination in person. This court does not consider that it needs the benefit of the witness being present in the courtroom to observe the witness in person to assess his credibility.

[110] This court considers that the Defendants concern is misplaced insofar as it is claimed that if the application is granted for RC to give evidence by way of video link the Defendants would not be allowed to present their case and to cross examine RC without the possibility or fear that their cross examination would be tainted by nuances in testimony and affected by technical glitches which are highly probable in video link evidence. If there is any unavoidable taint or technical glitches then this court considers that it is more likely to benefit the Defendants than the Claimants.

**What are the appropriate directions for the Video Conferencing which should be given?**

[111] In the circumstance outlined above, of the present case, this court, is prepared to grant the order that Robert Cummings of Huntsville, Ontario, Canada, former Chief Executive Officer of the 1<sup>st</sup> Claimant, be granted permission to provide evidence to the court and to be cross examined by

the Defendants/Respondents by video-link or by any other means deemed suitable by the court, including teleconferencing;

**Costs of the Teleconferencing and of this application?**

[112] This court will order that the Claimants bear all the costs related and incidental to the setting up the video conferencing facility including any which the Defendants will have to bear.

[113] The costs of this application will be cost in the cause

**Disposition**

[114] Robert Cummings of Huntsville, Ontario, Canada, former Chief Executive Officer of the 1<sup>st</sup> Claimant, is granted permission to provide evidence to the court and to be cross examined by the Defendants/Respondents by video-link or by any other means deemed suitable by the court, including teleconferencing

[115] This court will order that the Claimants bear all the costs related and incidental to the setting up the video conferencing facility including any which the Defendant will have to bear.

[116] The costs of this application will be cost in the cause

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**The Hon. Mr. Justice Courtney A. Abel**

**16th April 2019**