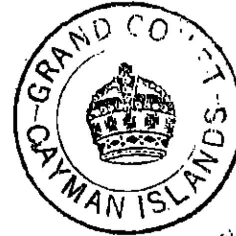


IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO 1 OF 1999

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL

PURSUANT TO THE PROCEEDS OF CRIMINAL CONDUCT LAW (2000 Revision)

AND IN THE MATTER OF DONALD FRASER DEFENDANT
AN APPLICATION BY GILLIAN FRASER

Coram: The Chief Justice

Date: 16th October 2003; 4th November 2003

Appearances:
Mr. Ramon Alberga QC instructed by Mrs. Linda DaCosta and Mr. Bryan Ashenhiem of Myers and Alberga for the Applicant.
Mr. Stephen Hall-Jones and Miss Cheryl Richards for the Attorney General.

The question that arises at this stage of the proceedings is whether given the circumstances presented, it is just and proper to allow Mrs. Gillian Fraser to give her evidence under cross-examination by televideo conference link, instead of being physically present in person.

Mr. Hall-Jones for the Attorney General concedes that the jurisdiction to make the order is within the inherent powers of the Court to regulate its own procedure and within the Rules of Court.

He objects nonetheless on the ground that Mrs. Fraser's reasons for seeking this dispensation from the Court – her fear of being arrested if she comes of the jurisdiction for reasons explained below – is an improper basis for granting it.

During the arguments Mr. Alberga sought, as her counsel, to explain Mrs. Fraser's reasons but they could only properly be put before the Court by way of evidence from her. This therefore came later in the form of an affidavit.

These are proceedings brought by Mrs. Fraser by which she seeks the release, from earlier restraint orders made by this Court on 25th October 2000 and 20th May 2001, of assets which the Crown asserts belong to her husband Donald Fraser. Donald Fraser has been charged for various offences of fraud and money laundering. The orders of restraint apply to various assets and accounts held at Eurobank (in liquidation) in the names of several companies, alleged by the Crown to be owned and/or controlled by Donald Fraser. One of those companies known as Mogal Corporation, is among those to which Mrs. Fraser particularly asserts her independent claim of innocent ownership. She asserts a personal claim to its assets.

Against that background, her most recent affidavit speaks to the present issue of the manner in which she should give her evidence in the following terms; (paragraphs 3 – 8):

3. "I confirm that I have no objection whatever to being cross-examined on the 2 affidavits filed by me in this matter dated 3rd March 2003 and 11th September 203, respectively. I desire as stated by my Leading Counsel at the hearing before the Chief Justice on 16th October 2003, that I should like this cross-examination to take place by video conference link and confirm that I am prepared to bear the initial expense for the technical arrangements for such a video conference link to be held.

4. I have been shown an affidavit that was sworn herein by Detective Constable Gary McLean on 9th May 2003 and crave leave to refer to that affidavit and in particular to paragraph 15 thereof which reads as follows:

'Gillian Fraser states in her affidavit that in 1984 she 'acquired complete control of Mogal Corporation'. She maintains that this control was solely hers up to the present day. If this were to be the case then Mrs. Fraser must have been fully aware of the relationship, which Mogal had with the rest of the Fraser network. As such it is reasonable to believe that Gillian

Fraser must therefore have been fully compliant with the rationale behind such a relationship. The evidence in the possession of the Crown establishes that this rationale was fraudulent and that by implication Gillian Fraser may therefore have been a party to the commission of criminal offences.'

5. The liquidation of the bank known (as) the Eurobank commenced in June 1999 and until this paragraph in Mr. McLean's affidavit referred to above appeared, there was never the slightest suggestion that I was guilty of fraud or that I had been a party to the commission of criminal offences. Such allegations appeared for the first time after I had brought my application to vary the restraint Order made on 25th October 2000.

6. I am informed and verily believe that at the hearing of an application to strike out Detective Gary McLean's affidavit, my Counsel complained about the sudden appearance of the allegations contained in paragraph 15 of his affidavit and that thereupon Mr. Hall-Jones who represented the Crown indicated that he was not prepared to give any undertaking that I would not be charged for criminal offences. In view of the content of paragraph 15 of Mr. McLean's affidavit and the statement made by Mr. Hall-Jones, I am apprehensive and fearful that if I attend personally in Grand Cayman to submit to cross-examination that there is every likelihood that during the period that I am there I will be arrested and charged with certain criminal offences which exist in the mind of Detective Constable Gary McLean and that I shall not be permitted until after a lengthy and expensive criminal trial to leave the Cayman Islands. I am advised and verily believe that my fear and apprehension in this respect is justified and that I am also justified in concluding that my liberty is at stake should I attend personally in the Cayman Islands.

7. In the circumstances I am not prepared to run the risk of beirg deprived of my liberty and possibility of having to defend myself against any criminal charges that may be laid against me by the Crown and having to establish at lengthy and expensive criminal proceedings that I am not guilty of any such offences. For these reasons I do not wish to attend personally in the Cayman Islands for cross-examination but confirm that I am prepared to submit to such cross-examination by means of a video conference link.

8. I confirm that if the application of the Crown for me to be ordered to attend personally for cross-examination is made that it is more than likely that I will be deprived of my access to this Honourable Court to ask for the variation of the restraint Order that I have sought, as I am not prepared to run the risk of being arrested and detained there whilst I am involved in a criminal trial to prove my innocence of the offences for which it is indicated that I am likely to be charged even if the statements that I made in my affidavits are found to be correct".

Thus presented, the issue to be resolved now is stark and clear: do the circumstances justify deviation from the ordinary rule; which is that persons who are required to testify attend in person to give evidence before the Court?

Where a party to an action relies upon affidavit evidence as does the applicant here, an opposing party may serve notice requiring the affiant to attend the hearing to be cross-examined upon their affidavits.

Such a notice was served by the Crown upon Mrs. Fraser requiring her attendance for cross-examination. While that notice was served pursuant to Rules which have been abolished (the Civil Evidence Rules – rule 4 (4)) – as to which see earlier Ruling given in these proceedings on 24th June 2003); it could validly have been served pursuant to Grand Court Rules Order 38 Rule 2 (3) and Mr. Alberga for the applicant takes no point as to the validity of the notice.

Given the factual nature of the assertions and counter - assertions to be examined upon the application, the notice requiring the applicant's attendance to allow cross-examination upon her affidavit is otherwise unexceptionable, was not resisted and so the order in those terms was granted. This was the order that most immediately gave rise to the present issue.

The Crown's objection to an order permitting the applicant to testify by video conference link was expressed by Mr. Hall-Jones in the following terms. First, that the ordinary rule is that witnesses are to be personally present in Court and that the onus rests upon the applicant to show some good reason why the accommodation she seeks should be granted. If ordered to attend in person and the applicant fails to do so, her affidavit may not be used as evidence without the leave of the Court: GCR O.38 R2 (3).

That there are good reasons for the ordinary rule such as the opportunity it affords for the direct three-dimensional observation of the witness' demeanour and deportment going to the important matters of credibility and veracity. The Court and the cross-examiner should be able to "look the witness in the eye"; the better to assess the worth of the testimony; video-conferencing being a "poor substitute" for seeing the witness in person.

Mr. Hall-Jones also argued that where the witness is also a party to the action, different considerations apply; as a party to the action should be obliged, having invoked the process of the Court in support of her cause, to be amenable as the ordinary process of the Court would require. As a party she is to be regarded as being compellable. That it is therefore an astonishing proposition, that the applicant should be able to refuse to attend in person, thus avoiding the criminal process of the Court, even while seeking to benefit from its civil process.

Mr. Alberga's response is that that view of the applicant's position is to mistake her reasons for not wanting to attend.

That she intends no disrespect for the Court's process nor seeks to avoid it in anyway.

Her concern is that no assurance has been given allowing her to come to the jurisdiction to pursue her application free from arrest at the instance of the police, in whose mind she may be regarded as liable to arrest and prosecution. If that were to happen, she could obtain no immediate remedy from the Court and would be obliged to engage the criminal process; and no doubt at great expense, before she could clear her name and secure her liberty.

She had been advised that that risk existed and simply was not prepared to take it. While she asserts her innocence – which must be presumed in any event – without the

accommodation of being allowed to testify by video link, she would be barred from the judgment seat in respect of her claim to the assets which have been restrained. In weighing the issues, the Court should further bear in mind that she is willing to undertake the initial costs involved, subject only to her right to recover them as against the Crown; if she succeeds.

In considering these competing arguments, I am mindful that the modern approach to the conduct of the business of the Court requires not only that matters be justly resolved, but also that they be resolved in an expeditious and economical manner. Taken together, those are the overriding objectives of the modern Rules of Court.

Efficiencies are to be encouraged wherever possible. The overriding objectives recognize that even a just decision can amount to nothing more than a pyrrhic victory, if the proceedings are plagued by delays and wasted costs.

Accordingly, the Preamble to the Revised Rules of Court (GCR 1995 Revision) at paragraph 4 (2) (k); now state that in furthering the overriding objectives, the Court's duty in managing proceedings will include "making appropriate use of technology". And GCR Order 25 Rule 1 (1) and 3 which, among other things, express the right of the Court of its own motion to invoke the Rules; are amendments to the Rules intended to allow the actualization of the overriding objectives.

Seen in the light of the modern rules, I am of the view that the appropriate use of technology is to be the norm rather than the exception. Emphasis is of course however, to be placed upon what is appropriate.

Mere convenience to a witness or a party will not be sufficient basis, if the use of technology will detract in any meaningful way from the efficacy or even the dignity of Court proceedings.

The typical reason for using technology, such as in the form of televideo links and telephone conference calls; will be the costs efficiencies to be expected.

In this case the primary reason presented is however, even more fundamental. The applicant, accepting the reasonable advice of senior counsel as to the risks, would not attend in person. She would, without being allowed to testify by video-link, be therefore precluded from pursuing an arguable action before the Court for fear of arrest; her presumed innocence notwithstanding.

The avoidance of such an outcome must be an imperative duty of the Court.

The concerns raised by Mr. Hall-Jones can be of comparatively little moment by comparison. In the experience of this Court in criminal proceedings, the use of video-link technology (enabled for criminal proceedings by statutory provisions) has given rise to no concerns about the quality of the images or the ability to observe the witnesses' demeanor.

On the contrary, the images are expected to be large and clear and the presence of the witness in the courtroom hardly diminished as a result. Should the Court so direct, there is also the practical advantage of being able to review testimony obtained in this manner because it can be recorded.

There are however, potential disadvantages which must be acknowledged. If examination or cross-examination of the witness is likely to be lengthy, the slight time

delays between questions here and responses from the remote location can become tedious and even distracting.

If the testimony is to be complicated by the involvement of large volumes of documents, it is also likely to be more manageable to have the witness physically present in Court for reference to the documents.

This is said to be a concern in this particular case, as the enquiry into the true ownership of the assets will be a document intensive exercise.

In response to this particular concern, I have been given the assurance that the documentation can be reduced into digital format and transmitted for the simultaneous reference of the witness overseas and those in the Courtroom here; and that as in the case of a lengthy and complex criminal trial conclude earlier this year, the video-link technology will permit this without any hindrance to the proper management of the trial or the flow of cross examination. There is also to be acknowledged of course, the significant expense of the tele-communication link itself which, over a long period, can surpass even the costs of having a witness attend from overseas in person.

The foregoing are however, nothing more than the details to be factored in, perhaps along with others, for the exercise of discretion in any particular case. For reasons already explained, they are, not to preclude an otherwise appropriate order in this case.

The additional status of a witness as a party to the action can be in and of itself; of no significance in this context. Factual testimony will be important requiring of careful scrutiny, whatever may be the relationship of the witness to the proceedings. The use of the technology will not be any less appropriate, simply because a witness happens also to be a party to the action.

There is of course, the proper concern; that witnesses who testify from overseas by way of modern technology, are not fully amenable to the jurisdiction of the Court. If they give perjured testimony or refuse to comply with directives, they are not immediately subject to sanction.

Such concerns may not, however, preclude testimony where a witness is to be available only by the remote reaches of technology. If and when those concerns materialize, they may go to whether or not the witness' testimony is to be admitted or, if admitted, as to what weight is to be attached to it.

So, for instance, if in this case the applicant were to refuse to answer questions on the grounds of privilege against self-incrimination, despite a directive from the Court; the outcome would depend upon the manner in which the Court determines her evidence should be treated.

Her physical absence from the jurisdiction and the inability of the Court immediately to impose any appropriate sanction, would be no impediments to the dispensation of justice in the cause.

Assurance can be taken from the fact that the forgoing are all concerns with which Courts have had to deal before.

It is instructive that in those cases, as here, the concerns have proven to be no real impediment to the practical application of the modern rules.

In Garcin and others v Amerindo Investment Advisors Ltd. and others [1991] 1 W.L.R. 1140; a witness who was himself allegedly implicated in certain fraudulent transactions, was willing to testify but refused to travel to England to be present at the civil trial touching upon matters related to the fraud. He gave no explanation for his refusal to

appear in England but, from all the circumstances, it was to be assumed that he was apprehensive of the possible repercussions. The judge of the Chancery Division Morrit J; was required in his judgment primarily to focus upon the question of his jurisdiction to make the order allowing the witness to testify by video link. He found jurisdiction and granted the order by reference to the former Rules of the Supreme Court Order 38 Rule 3 (which was in terms practically identical to GCR Order 38 Rule 3) and which provided inter alia that:

> "---the Court may, at or before the trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order".

The treatment of the subject by the Court in Garcin advances the axiomatic proposition, that where the use of technology will enable the proper resolution of a matter to be tried where otherwise an important witness who is not compellable will not be available, the order for its use will be made.

So too it appears was the approach adopted by the Jamaican Court of Appeal in Wallace (executor of the estate of Lambert) and Lemard, Ramsay and others) SCCA No. 127198, judgment delivered on 29th November 1999. At page 22, Walker J.A. in giving the majority judgment stated:

> "Now, where the instant proceedings are concerned, the evidence of the witness, Nairn, is crucial to the appellants' case and the fact of the matter is that *for whatever reason*, Mrs. Nairn is unwilling to come to Jamaica from the United States of America where she presently resides for the purpose of giving that evidence.

By parity of reasoning which Morritt J. employed in the Garcin case [(cited supra)] a line of reasoning with which I respectfully agree, it is, I think, true to say that if the appellants' request were granted in the instant case, the required evidence would be given by Mrs. Nairn in the United States of America, which is the place where she would have made her oral statement. As such it would be admissible under section 31 E(1) of our Evidence Act if proved by someone who heard it.

Furthermore, in such a situation, any video conference or video link of the examination and cross-examination of the witness would be similarly admissible as a document in which the statement was made in terms of section 31B of the Jamaican Evidence Act".

Thus, while the focus of the judgment there also was upon the matter of jurisdiction (a matter properly conceded in this case by the Crown) it is clear from the words in emphasis, that absent even a stated reason for personal non-attendance, the Jamaican Court would adopt a liberal approach to the admission of video-link testimony; if necessary for the adduction of important testimony.

The experience of the Australian Courts where, since as long ago as 1976, statute has enabled evidence to be given by video link in Court proceedings; is instructively chronicled in a judgment with which I have been provided.

In Australian Competition and Consumer Commission v World Netsafe Pty Ltd 119 FCR 303 [2002] FCA 526; an undischarged bankrupt, a Mr. McCluskey, refused to return to Australia to testify "due to business commitments" in Malaysia where, it seems, he had relocated. The Court allowed the application of the Australian Competition and

Consumer Commission (the ACCC) that McCluskey be cross-examined by video-link upon his affidavit on which the ACCC wished to rely.

In delivering the judgment, Spender J citied earlier Australian cases including this passage from McDonald v Commissioner of Taxation [2000] ATC 4271 per Finn J:

> "As is now well known the video link facility is being utilized with greater regularity and acceptance in Court proceedings – particularly of this Court – as judges have come to acknowledge the apprehended disadvantages from the use of video – link have not materialized as expected".

And per Katz J from Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd, [2000] FCA 1261:

> "Significantly, the facility has been used notwithstanding that a witness' evidence, for example, (a) was "central" to the case, (b) was contentions, (c) would be expected to occupy three to four days and (d) was to be given in a serious criminal matter ----. Equally, judges have accepted that in relation to trials that a video link is, for practical purposes, much the same as hearing evidence in Court: see Lord Donaldson MR's observations quoted in B v Dentists Disciplinary Tribunal [1994] 1 NILR 95 at 107; and that it does not pose a significant impediment to the assessment of a witness' demeanour---"

While Spender J. was himself unwilling to accept the complete equation of video-link with viva-voce testimony; he concluded in the following terms in allowing the ACCC's application at paragraphs 9 + 10; page 4:

> "--- In this case, I think there are good reasons shown ---. The fact of the matter is that Mr. McCluskey cannot be compelled by the ACCC to appear in person, and

unless his evidence can be tested by cross-examination by video-link, the evidence would not be available at all.

I do not accept that this is giving some sort of encouragement to Mr. McCluskey in the achieving of his purposes in remaining outside the country. Those questions are, of course, relevant to any question of credit that may arise with respect to the weight to be given to his evidence.

In my opinion, the fact that the ACCC will not be able to rely on Mr. McCluskey's evidence at all unless he is cross-examined by video-link is a good reason why cross-examination– with the deficiencies which I believe attend cross-examination by video link – should be permitted by that method."

Finally, the recent outcome in the English case of Rowland and Morgan v Bock [2002] 4 All E.R. 370; is most directly appropo the circumstances presented by the case before me. One of the claimants a Mr. Norgren, a Swedish businessman, brought proceedings against the defendant for recovery of a fee of £250, 000 claimed by Mr. Morgan to be due to him for having brokered certain financial arrangements.

Mr. Norgren was, however, the subject of a request for his extradition to the United States, and he risked being arrested upon warrant if he returned to the United Kingdom to testify in support of his claim. He therefore sought the Court's permission under the modern Civil Procedure Rules (the CPR) to give his evidence at the trial by way of a video-link. The Master at first instance held, inter alia, that it would be unfair to the defendant to be cross-examined in Court when the claimant would be cross-examined on video; and that the circumstances which prevented Ms. Norgren from coming to England did not outweigh that unfairness to the defendant. Further, that the giving of evidence

through video-link was a second class way of conducting a trial, that it should only be ordered where there is a pressing need for an order, eg: if a witness were too ill to attend in person; and that the extradition proceedings against the claimant Mr. Norgren were a separate matter. On that approach the Master refused the application.

On the appeal, Newman J. took a different view. He held that no defined limit or set of circumstances should be placed upon the discretion to permit video-link evidence. A conclusion to the contrary would conflict with the broad and flexible purpose of the CPR. Although 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 an application beyond a favourable exercise of the discretion; CPR 1.1 and 1.4 envisaged considerations of costs, time, inconvenience and so forth as being relevant considerations. Moreover, save in exceptional circumstances, full access to the Courts for justice in a civil matter, should not be at the price of a litigant losing his liberty and facing criminal proceedings.

Save for adding the reminder that the personal attendance of a witness in Court is to be preferred unless there is a good reason to depart from that established practice; I adopt the pragmatic views expressed in the cases cited above as being generally suitable for application in Mrs. Fraser's case.

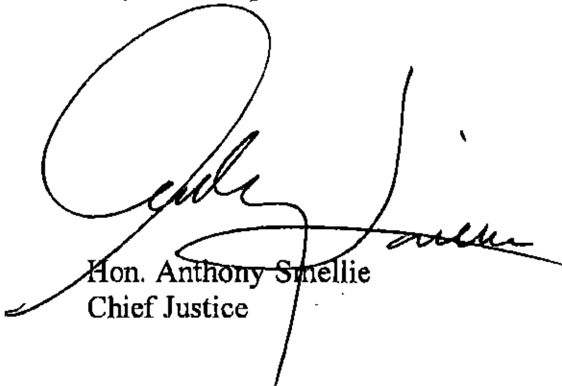
In summary, while the mere convenience of the video-link should not be allowed to dictate its use; the modern approach to the management of cases favours the use of technology in appropriate circumstances and each case must be considered in its own context. A judgment must be made in every case in which its use is to be considered, not

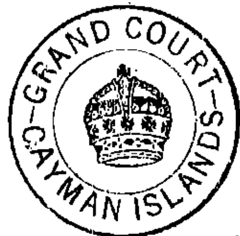
only as to whether it would save costs; but also as to whether its use will be beneficial to the efficient, fair and economic disposal of the case.

I grant the application that Mrs. Fraser be allowed to give her evidence under cross-examination by way of video conference link; subject to the conditions that she assumes the initial expenses and that arrangements are in place to ensure the presentation of all documents required for her testimony, in a manner which will ensure both the efficient management of her cross-examination and of the trial.

I take this opportunity also to note the reference to CPR part 32 Practice Direction Annex 3: Video Conferencing Guidance, which was provided by Mr. Alberga.

It is a very useful guide and one which I intend shortly to adopt and adapt for issuance by way of local practice directions for the similar purposes.





Hon. Anthony Smellie
Chief Justice