

**IN THE SUPREME COURT OF SEYCHELLES**  
**MA 364/2016 and MA 367/2016 arising in MC 95/2016**

**MC 94/2016**

**MA102/2016 arising in MC 40/2015**

**[2017] SCSC 19**

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**Financial Intelligence Unit**

Applicant

versus

- 1. Contact Lenses Limited**
- 2. John Dreyer**
- 3. Donna Dreyer**
- 4. Maple Limited**

Respondents

**In the matter of an application for evidence to be heard by way of live television link**

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Heard: 6 December 2016

Counsel: Mr. Barry Galvin for Applicant

Mr. Rene Durup for Respondent

Delivered: 19 January 2017

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**ORDER**

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**M. TWOMEY, CJ**

[1] For the purpose of these consolidated cases the parties in this decision are referred to as follows: the Financial Intelligence Unit (FIU) as the Applicant and Contact Lenses Ltd as

the First Respondent, John Dreyer as the Second Respondent, Donna Dreyer as the Third Respondent and Maple Limited as the Fourth Respondent.

- [2] The Applicant is seeking an interlocutory order pursuant to section 4 of the Proceeds of Crime (Civil Confiscation) Act 2008 (hereinafter POCA) prohibiting the Respondents or any person who has notice of the order from disposing of or dealing with or diminishing in value the sums of money, hereinafter referred to as specified property. It is also seeking a receivership order pursuant to section 8 of POCA.
- [3] The specified property referred to is the following: USD37, 997.94 held in USD account number XXXXX, GBP 313,032.17 held in GBP account number 038 7601732, EUR 49,961.34 held in EUR account numbers XXXX and XXXXX by the First Respondent with Barclays Bank (Seychelles) Ltd, a Sunseeker Motor Yacht, “MOJO” owned by the Second Respondent and Apartment XXX at Eden Island, Seychelles registered in the name of the Fourth Respondent with beneficial interests therein by the Second and Third Respondents.
- [4] The Applicant is a statutory body and its application is brought by way of notice of motion and supported by an affidavit sworn by Mr. Finbarr O’Leary, Deputy Director of the Applicant. The First Respondent is a Seychelles International Business Company incorporated on 21 December 2005. The Second Respondent is a business man with an address in Vancouver, British Columbia, Canada, the Third Respondent is the wife of the Second Respondent and the Fourth Respondent is a Seychellois company, number 86348-1 with a registered address at Room 306, Victoria House, Victoria, Mahe, Seychelles.
- [5] A motion was then filed by the Respondents praying for the dismissal of the Applicants’ application supported by affidavit of the Second Respondent in which he deponed that his statements were sworn in his own personal capacity and as the representative of the First Respondent and Fourth Respondents in his capacity as their directors. The Third Respondent also filed a reply affidavit in which she adopted the Second Respondent’s statements and averments made in his affidavit.
- [6] At the preliminary hearing of the section 4 application two further applications were made by the parties namely:

1. An application by the Applicant for an order directing the attendance for cross examination of the Second Respondent and Mr. Bobby Brantley
2. An application by the Respondents for the evidence of the Second Respondent to be heard by way of rogation through live video link

[7] The application for the cross examination is made pursuant to Rule 9(5) of the POCA Rules but also in terms of section 169 of the Seychelles Code of Civil Procedure. This application is in order and granted.

[8] The application for rogation is made pursuant to section 11 of the Evidence Act which provides in relevant terms:

*11. The Supreme Court may in any civil cause or matter, when a party or witness cannot attend before the court through illness or other lawful impediment and where it shall appear necessary for the purposes of justice, make an order for the examination on personal answers or upon oath or solemn affirmation before any person appointed to be examiner; and at any place, of any witness or person, and may make such order as may seem proper as to notices to be given to interested parties and as to the mode in which such examination is to be conducted, and may order any deposition so taken to be filed in the registry of the court, and the court may, at the hearing of such cause or matter, of the court, and the court may, at the hearing of such cause or matter, empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court may direct...*

[9] Section 11 C (2) also provides that the court has discretion to permit the cross examination of a witness by live television link in circumstances where:

- (a) a person other than the accused is outside Seychelles; or*
- (b) it is not reasonably practicable for a person, other than the accused, to be brought before the court in person; and*
- (c) the court is of the opinion that it is desirable and practicable that the person give evidence before the court under this section; and*
- (d) the arrangement would not unfairly prejudice a party to the proceedings...*

- [10]** The Second Respondent has not filed any supporting documentation as to the availability or preparedness of the courts of British Columbia to hear his evidence or how the Applicant would be facilitated in this process. It would appear that despite applying for rogation of his evidence, the Second Respondent's application seems to be based almost entirely on a request to be cross examined in Canada over live television link with Seychelles.
- [11]** He has deponed that he is now settled in Canada and is the process of selling his house in Seychelles. He avers that travelling to Seychelles would involve considerable stress and involve jet lag and that he would need to be in Seychelles for a minimum of one week before the case to be in a fit state to stand trial. He also avers that the process would involve considerable cost for travel and accommodation; that he is diabetic and the journey would tire and stress him increasing his blood sugar to the detriment of his overall health. Finally, he depones that the total time involved for the trial would mean an absence of two to three weeks from his business which would have a significant impact on its operation.
- [12]** The Applicant has countered these averments by submitting that as the credibility of the Second Respondent is at stake in these proceedings, the observation of his demeanour and body language at first hand and not remotely are crucial for the assessment of his credibility.
- [13]** It has also highlighted logistical difficulties in the process proposed by the Second Respondent. First of all, it submits, the cross-examination of the Second Respondent is bound to be lengthy and complex given the nature of the proceedings and the fact that the Second Respondent's evidence is centrally important to the case. Secondly, cross examination would be curtailed as no spontaneity would be possible, for example in presenting new documents to the Second Respondent and questioning him on them. It submits that this would unfairly prejudice its case. Thirdly, the 12 hour time difference between British Columbia where the Second Respondent is currently resident and Seychelles would create difficulties for the court. Fourthly, it would be impractical to effectively cross examine the Second Respondent by referring him to documents in the

large bundle of exhibits when there are real possibilities of the witness being unable to find the relevant pages or documents.

- [14] The Applicant has also submitted that there has been no information or clarity given by the Second Respondent of the proposed location from which the evidence is to be heard and what safeguards if any would be put in place to ensure that he would be alone, not coached, unable to discuss evidence or the case during breaks and whether a secure link would be available to ensure the observation of the witness at all times. Moreover, it submitted, there would be concerns over the procedure in the event of technological problems including a time-lag or audio difficulties.
- [15] The Applicant has also submitted that the Second Respondent has himself averred that he recently took a long flight to the UK to attend a wedding which indicates that he is fit and willing to fly long distances.
- [16] I take into account the reasons provided by the Second Respondent in his inability or the impracticality of him physically attending the court in Seychelles for cross-examination and the Applicant's reasons for opposing the application.
- [17] The provisions of section 11C have never been tested in Seychelles and there are no authorities on which this court can rely. The case of *Chetty v Chetty* (1936) SLR 1 in which the court refused an application for a Rogatory Commission to hear evidence in India relied on by Mr. Durup does not help his case and relates specifically to section 11 of the Evidence Act.
- [18] There is in any case a world of difference between travel facilities in 1936 and 2017 both in terms of time and monetary constraints. *Chetty* established that a strong case has to be made for evidence to be held by rogation and that it must be in the interest of both parties and must not prejudice the court in assessing the credibility of the evidence.
- [19] The present matter case concerns the taking of evidence by live television link. Mr. Galvin for the Applicant has provided some modern authorities from Commonwealth countries. In *Ithaca (Custodians) Ltd. v Perry Corporation* [2003] 2NZLR 216 the trial judge refused such an application on the grounds that where the witnesses' evidence

*“relates to evidence that goes to the very heart of the proceedings, and the credibility and reliability of the witness are crucial to the determination the court must make, there is no substitute for that witness giving evidence in person.”*

**[20]** In *Asic v Rich* [2004] NSWSC 567, the Supreme Court of New South Wales dismissed an application for the taking of evidence by audio visual link of an expert witness. The court stated that although in some cases it is possible to judge the credibility of a witness, there were:

*“exceptional cases where the audio visual procedure [would] put the cross-examiner and the court at a real disadvantage in dealing with credit. They [would] include cases ... where the witness’s evidence [was] centrally important and the cross-examination [was] likely to be long and complex, and the issue of credit [was] likely to depend upon the witness’s responses to questions based on documents shown to him by the cross-examiner...”*

**[21]** The court also found that the management of documents in cross examination and the technological difficulties involved would create the inordinate lengthening of the cross examination. In the event, the evidence was allowed to be taken by a trial judge in England. However the letter of request for such a procedure and the acceptance of the English Master of the Royal Courts of Justice was produced in evidence.

**[22]** The court also allowed evidence by audio visual link in respect of an expert in *King v Rail Corporation New South Wales* [2012] NSWSC 832 where it decided that the process would not be unfair to the plaintiff, the evidence was of a limited compass and not central to the issues to be decided; the examination would not be lengthy; and the balance of costs and convenience strongly favoured the making of an order.

**[23]** In general it must be noted that section 32 of the Criminal Justice Act 1988 (UK) allows evidence to be given by a witness (other than the accused) by way of “live television link.” The landmark case in the UK is *Polanski v Conde Nast Publications* [2005] UKHL 10 which is relied on by Mr. Durup. On the issue of whether Mr. Polanski’s evidence could be allowed by video link from France, the House of Lords held on a majority of three to two that the evidence would be allowed as the respondent would suffer no

prejudice from the evidence being given by video conference and that Mr. Polanski would continue to be a fugitive from justice irrespective of whether the video link order was made. A refusal would only deprive him of his right to vindicate his civil rights in the courts of England and Wales. *Polanski* was in the event decided on whether the application for video link evidence was reasonable.

[24] Since the *Polanski* case, other considerations have been taken into account in allowing or refusing the use of video link evidence. In *AG of Zambia v Meer* [2006] 1 C.L.C. 436, the court refused such an application after taking into consideration the fact that additional costs would have to be incurred in order to use audio link given the less developed infrastructure in Zambia. In *Bank of Credit and Commerce International SA v Rahim* [2005] EWHC 3550 (Ch), the Chancery Division of the High Court of England held that if a witness is not a party to the case, the Courts are more likely to allow the use of video link evidence. In *McGlenn v Waltham Contractors Limited* [2006] EWHC 2322 (TCC) the High Court considered whether the weight of the witness' evidence was of crucial importance or only ancillary. Where the evidence was only ancillary, it would be less important that the person appear in person and, therefore, the Court would be more likely to allow video link evidence. Second, the Court also asked whether there was a real, as opposed to fanciful reason why video link evidence was being sought. If the request was only fanciful, the Court would clearly be less inclined to grant it. In the end the court made the order for video link evidence as it concluded that the order would not cause significant prejudice to the defendants who could still cross-examine the claimant effectively by video link and the claimant's evidence would not be of critical importance at the trial.

[25] In the United States it is very difficult in light of the strength of the confrontation clause of the American constitution to have a witness testify via video-link (see *Maryland v Craig*, 497 U.S. 836 (1990)).

[26] The comparative study above allows the court a frame of reference in applying the provisions of the law as they exist in Seychelles. In examining these provisions, I bear in mind that the following considerations have to be taken into account when I exercise my

discretion in whether or not to grant the application for live television evidence by the Second Respondent:

1. The general rule is that evidence is adduced by the hearing of oral evidence in court.
2. Evidence by live television link is therefore of an exceptional nature.
3. An order for giving evidence by live television link is discretionary.
4. In exercising its discretion, the court may allow such a procedure where it is not reasonable for the person to be brought before the court and that it is desirable and practicable that evidence be given this way and that such an arrangement would not prejudice a party to the proceedings (emphasis added).

[27] I have also applied my mind to the fact that were I to allow such a process for the evidence to be taken certain logistics would have to be explored and put in place, for example :

1. The contact details of the place of hearing and remote site would have to be exchanged.
2. The details would have to include ISDN numbers for the live television link, fax numbers, telephone numbers and email addresses and court staff at either location would have to identify if documents would need to be sent by fax or scanned and sent by email to the other location.
3. Court staff would have to check that all documents held at the place of hearing and the remote site were complete. The technical staff at both locations would have to test the equipment by initiating a test link and again on the day the evidence to is be adduced at that location and be responsible for remedying the problem.

[28] None of these practicalities have been addressed or resolved by the Second Respondent prior to his application and the court given its limited means is not in a position to assist with these burdensome and expensive duties.



- [29] I have also taken cognisance of the voluminous bundle of documents related to this case and the cross referencing involved in terms of the affidavits already attached and the section 4 application (POCA) and other supporting documentation. The complexity of referring a witness to these documents over a screen far removed from court does not seem to be practicable.
- [30] I am also conscious having read the pleadings that the Second Respondent is a party to the proceedings and that his testimony will be centrally and crucially important and will go to the heart of these proceedings.
- [31] There is also no evidence of an illness on the part of the Second Respondent which would amount to a lawful impediment to his travel to Seychelles. Type 2 diabetes is a manageable condition suffered by about 8% of the world population. There has been no evidence adduced by the Second Respondent to show that travel is contra-indicated for his condition. I read from <https://www.diabetes.org.uk/travel> that “People with both Type 1 and Type 2 diabetes can travel all over the world – diabetes is no barrier.” The fact is in any case that the Second Respondent travelled to England for a wedding recently.
- [32] There is also no evidence that the Second Respondent will suffer any undue expense for attendance in Seychelles for cross examination given the fact that he owns a villa and a yacht in Seychelles and he has residency status in this jurisdiction.
- [33] I come to the conclusion that there is no valid reason why the Second Respondent cannot attend court. It is also neither desirable nor practicable that evidence be given this way and in any event much prejudice may be suffered by the Applicant in this case should the Second Respondent be cross examined by live television link.
- [34] In the light of all these considerations I exercise my discretion to refuse the Second Respondent’s application to have his cross examination conducted by live television link. I am not in a position to consider the conduct of the cross-examination out of the jurisdiction by a judge in British Columbia as no evidence was adduced as to the practicalities of such a process.

[35] I therefore order the Second Respondent to attend the Supreme Court of Seychelles for cross examination in relation to the sections 4 and 8 applications under POCA.

[36] Costs of these applications will abide the event.

Signed, dated and delivered at Ile du Port on 19<sup>th</sup> January 2017.

**M. TWOMEY**  
Chief Justice