No. VID 1023 of 2023

Federal Court of Australia

Registry: New South Wales

Moira Deeming

Applicant

John Pesutto

Respondent

APPLICANT'S NOTE IN RESPONSE TO AVL APPLICATION

A. APPLICANT'S POSITION

1. The applicant does not consent to the respondent's application for Mr Bach to give evidence by audio visual link because:

   (a) Mr Bach gives contentious evidence in his first affidavit (CB:32, p389) affirmed 26 May 2024 throughout paragraphs 9 to 59 and in his second affidavit (CB:33, p400) affirmed 16 July 2024 from paragraphs 3 to 24 where he directly challenges the evidence of Mrs Deeming; and

   (b) the evidence on the application does not establish a sufficient basis for the Court to depart from the ordinary rule that evidence be conducted in person.

B. PRINCIPLES

2. The Court may exercise its power under s 47A of the *Federal Court of Australia Act* 1976 (Cth) to permit a witness to give evidence via AVL. As Wigney J said in *Rush v Nationwide News Pty Ltd (No 4)* [2018] FCA 1558 at [50]:

> The Court's discretion to order that evidence be given by video link is "a broad one with the determining consideration being the interest of justice": *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (2015) 231 FCR 531 at [16]. It is nevertheless necessary for a party who is asking the Court to exercise the discretion to make out its case for the making of such an order, particularly if it is opposed by the

other party: *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No. 3)* (2009) 181 FCR 152 at [78]. That is particularly the case where the evidence is contested, the witness is to be cross-examined and questions of credit, credibility and reliability are involved: see *Campaign Master* at [63].

3. The reference to paragraph [78] of *Campaign Master* is to the following passage from the judgment of in Buchanan J:

> *I share the concerns expressed by Spender J in World Netscape and by Stone J in Dorajay about the limitation on the effectiveness of video link arrangements as a means of taking oral evidence. I am particularly troubled by the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the courtroom. Although the days are gone when witnesses are expected to feel any sense of intimidation as an aid to telling the truth, there is no doubt in my mind that the requirement to give evidence on oath or affirmation in the (generally) solemn atmosphere of a courtroom in the presence of a judge, and to answer questions in cross-examination in the presence also of cross-examining counsel, has at least three potential benefits. It enhances the prospect that the witness will remain conscious of the nature and solemnity of the occasion and of his or her obligations. It affords the cross-examiner some reassurance that the gravity and immediacy of the moment, and of the supervising presence of the judge, are not lost on the witness and the cross-examination is not thereby rendered any less effective, to the possible prejudice of the cross-examining party. It provides the Court with a more satisfactory environment in which to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court. To my mind there remains, even in the modern context, a certain "chemistry" in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness. I would not wish too lightly to deprive a crossexaminer of that traditional forensic element in the exchange although, as the cases universally make clear, the Court must now, if asked to do so, balance the interests of a cross-examining party against claimed inconvenience both in individual cases and with respect to individual witnesses. Notwithstanding the increased availability and use of video link technology, in my view, a case must be made out for the use of video link evidence if it is opposed by an affected party. I do not share the view expressed by Katz J. My own view and, I think, the weight of authority, is to the contrary."*

4. The COVID-19 pandemic gave rise to exceptional circumstances and the principles that applied in that period no longer hold good. In any event, the experience of taking evidence via AVL during COVID highlighted a number of difficulties that are not true of the taking of evidence in the conventional way.

5. As Lee J said in *Palmer v McGowan (No 2)* [2022] FCA 32 at [43]-[47]:

> *Not only does receiving the evidence of the witnesses in person maintain fluidity between the witness, counsel and the judge, but there is much to be said about a witness coming into the usually unfamiliar confines of a courtroom, swearing an oath or taking an affirmation in a witness box to tell the truth, and proceeding to give evidence on oath or affirmation in the physical presence of counsel and the judge. There is a solemnity about the giving of evidence, and the formalities reinforce it.*
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> *In taking this view I am cognisant of the fact that a number of judges of this Court, including me, in cases such as ASIC v GetSwift (at [33]), Tetley v Goldmate Group Pty Ltd [2020] FCA 913 (at [16] per Bromberg J), Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd [2020] FCA 1153; (2020) 147 ACSR 521 (at 530 [49] per Stewart J), and Universal Publishing Music Pty Ltd v Palmer [2020] FCA 1472 (at [32] per Katzmann J), have expressed a degree of satisfaction and indeed enthusiasm as to the receipt of evidence at remote hearings, even in cases where credit is in issue. In many cases it is highly suitable for hearings to be conducted remotely. There have been less enthusiastic views expressed, but it is noteworthy that a number of the particularly favourable references to remote hearings in complex cases were made in 2020, at an early stage of the "unforeseen mass-pilot of remote hearings". At least as far as I am concerned (and I am aware my view is not unique), accumulated experience and subsequent reflection has caused views of at least some to evolve. Most relevantly, my view is no longer the same as it was before the experience of the last twenty months or so.*
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> *In relation to many witnesses, including highly intelligent professionals, I have come to appreciate a somewhat different dynamic between the witness and the cross-examiner than is present at an orthodox hearing. Speaking generally, the witness feels an additional degree of comfort in being physically remote from the courtroom and being in their own surroundings. Incidentally, a tell-tale indication of this more "relaxed" environment is often seen by witnesses being far more casually attired than would be the case if they came into Court. This might be termed the "leisure wear" effect. Further, as much as courts seeks to reproduce the solemnity of a traditional hearing while operating online, at least in my experience, there a distinct difference in atmosphere. It is jejune to assume that exchanges (which may include confrontational exchanges) between two persons in close physical proximity to one another, is the same as exchanges that occur in the less intimate world of a video link.*
>
> *Related to this point, is that increasingly I have felt a nagging disquiet that I may perhaps be missing something in assessing the evidence of a witness by reference to the tone of voice or non-verbal signals. As time has gone on, it is has become more evident to me that in an audio-visual feed, minor differences in emphasis or tone can be more difficult to appreciate and assess.*
>
> *It has, of course, become common for scepticism to be expressed about the advantage that trial judges enjoy in seeing a witness give evidence. But despite these well-founded criticisms and the fact that by video a judge can observe the*

> *manner of giving evidence remotely, based on my experience in recent times, I consider I have a better prospect of understanding the subtleties and nuances of the sort of evidence to be given in the present case, if it is given in person. Credit is likely to be a factor in resolving at least some issues in this case. It is unnecessary to be more specific for present purposes, but I cannot discount the possibility that in this case (and these assessments are always case-specific) the close and careful assessment of the evidence-in-chief may be relevant in properly fixing any award of damages to either claimant based on consolation for hurt, and evidence given in cross-examination may be an important factor which assists me in justly determining this controversy.*

6. In *Southernwood v Brambles Ltd (No 2)* [2022] FCA 973, the authorities were extensively reviewed by Murphy J at [27]-[44], including noting (at [29]-[30]) the repeated approval in this Court of the observations by Buchanan J in *Campaign Master* set out above.

C. CONSIDERATION

7. The respondent in his evidence and submissions has not identified a persuasive basis for the Court to grant the relief he seeks.

Materiality of evidence

8. Mr Bach gives evidence about a number of interactions between himself and Mrs Deeming and the respondent. Events on 19 March and 27 March 2023 are pleaded in the Defence in relation to contextual truth: CA:3, Annexure A [42]-[46]; [50]-[56]. Those interactions, in particular what was said in the presence of the respondent, are also key matters relevant to the s29A defences. The 19 March 2023 interactions are also pleaded in the particulars of malice in the Reply: CA:4, p156.

9. Thus the submission made on behalf of the respondent at RS[3.8],[3.10] that Mr Bach's evidence will not "be crucial or determinative of any issues in dispute" is curious. It also raises the question why the respondent is reading Mr Bach's affidavit or why he filed and served an affidavit from Mr Bach in reply if that is his view. If he genuinely does not consider that Mr Bach is a necessary witness in relation to an issue in dispute and cannot affect the outcome of the proceedings, then he need not read the two affidavits in question.

Credit challenge

10. It is anticipated that Mr Bach's credit will come under serious challenge from the applicant due to the contents of his affidavits. It cannot be said that the cross-examination of Mr Bach will be brief, particularly given the length of his affidavit in reply disputing the evidence of Mrs Deeming: c.f. RS[3.10].

Convenience of witness

11. It has not been suggested that Mr Bach cannot attend in person.

12. Mr Bach's affidavit identifies that he was a resident in England working as a teacher when he first volunteered to affirm an affidavit in these proceedings months ago. It is unclear why, given Mr Bach's professional and personal commitments, he volunteered to give evidence in proceedings half-away around the world if he was reluctant to attend to be cross-examined.

13. The trial was set on 2 February 2024. Mr Bach, on the evidence, despite affirming affidavits on 26 May and 16 July 2024 has apparently never made any attempt to make arrangements to give evidence in person in Australia. The applicant was first notified of the application on 7 August 2024. However, Mr Bach was not spoken to about attending in person, according to the evidence, until 9 August 2024 (presumably after the case management hearing that morning). One available inference is that the respondent assumed that Mr Bach would never have to attend in person – without making any enquiries of him at all about that issue, and merely on the basis that he resides overseas.

14. Mr Bach apparently now claims a series of inconveniences due to his pressing obligations in Brighton, England, in September. However, the evidence also discloses that Mr Bach plans to visit China for 10 days in that same period on a marketing tour for his school. This 10 day trip is apparently planned despite his pressing "pastoral care" obligations to his students and family obligations. It is unclear why he is able to take such a lengthy trip but does not have time to attend court in a proceeding he volunteered to give evidence in.

15. The evidence on this issue is unpersuasive and does not establish an inconvenience warranting the order sought.

Cost

16. The hearing is set down for 3 weeks and the respondent has briefed senior counsel with juniors and solicitors to attend on his behalf. The costs identified in the supporting evidence are not such as to have any real effect on the overall costs of the proceedings.

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