

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

Claim No. 2018/GEN/GLE/01042

BETWEEN

ROSALYN BROWN

Claimant

AND

COTSWOLD GROUP LIMITED

First Defendant

And

COTSWOLD CORPORATE SERVICES LIMITED

Second Defendant

AND

COTSWOLD INSURANCE (BARBADOS) LIMITED

Third Defendant

AND

COTSWOLD GROUP HOLDINGS LIMITED

Fourth Defendant

Before: The Honorable Madam Justice Carla D. Card-Stubbs

Appearances: Michael Scott, KC with Ms. Marnique D.C. Knowles of Counsel for the
Claimant

Mr. Roger Forde KC with Mr. Byran Woodside of Counsel for the
Defendants

Practice and Procedure – Application for witness to give evidence by video link – Part 29.3 of The Supreme Court Civil Procedure Rules, 2022 (as amended) - Part 1.1. - Overriding Objective, The Supreme Court Civil Procedure Rules, 2022 (as amended)

Introduction and Ruling

1. The Defendants have sought leave pursuant to Part 29.3 of The Supreme Court Civil Procedure Rules, 2022 (as amended) (“CPR”) for one of their witnesses to give evidence by video link or otherwise, remotely. For the reasons that follow,

the application is refused. This application was heard and determined pursuant to the Court's powers under Part 26.1(n) CPR to deal with a matter on written representations submitted by the parties.

Background

2. The filed action is an action for breach of contract. The Claimant's claim filed by way of Writ of Summons and Statement of Claim on September 11, 2018, and as amended by an Amended Statement of Claim filed January 21, 2022 is essentially for the payment of commission said to be due under "a catena of agreements" between the Claimant and the Defendants providing for the Claimant to carry out certain work for them. The Claimant is also seeking an account of referrals of clients to the First and Second Defendants by the Claimant.
3. Each Defendant filed and entered its own Defence. For these purposes, it is not necessary to reproduce the details of the specific Defence of each Defendant. In summary, the Defendants denied entering into the agreements as alleged. As alternative Defences to the action, the Defendants contend that, for various reasons, the alleged agreements are unenforceable as against them. The Fourth Defendant also filed a Counter-Claim for return of monies paid.
4. The first issue joined between the parties concerns the very existence of an agreement between them. This addresses the question of liability and may be phrased in the following terms: (i) Whether there was a binding agreement or, styled another way, a valid and enforceable contract between the Claimant and the several or any of the Defendants and, if so, (ii) whether there was a breach of that agreement by any or all of the Defendants.
5. On June 8, 2023, at a Case Management Conference, the parties sought and agreed to a bifurcated trial. Trial on the preliminary issue of liability was set to be heard for 3 days, viz, January 23, 24 and 25, 2024. This Court's directions included a direction on the mode of trial that it was to be "by way of an in-person hearing".

6. The parties each identified 2 witnesses and were to file witness statements accordingly.

Application to take evidence by video link

7. By Notice of Application filed on December 7, 2023 the Defendants, “jointly and severally”, sought leave to have one of their witnesses, Ian Towell, give his evidence by video link or other remote means “without being present in the courtroom”. This was supported by an affidavit of Mr. Towell.
8. The Application was opposed by the Claimant who filed an affidavit in response to the application for the evidence to be given remotely.
9. The main grounds advanced by the Defendants in the application are that Mr. Towell, a key witness for the Defendants, resides in the United Kingdom, has pre-arranged business commitments and would not be able to attend in person. The Defendants submit that a witness statement had been filed and that the Claimant would suffer no prejudice. They further submit that it would be prejudicial to the Defendants if their key witness were not present at trial and that it would be “inconsistent with the Overriding Objective which provides for a fair and economic disposal of the matter”.
10. On this point, Ian Towell avers in his affidavit as follows.

7. In pursuance of the said Order, on the 20 October, 2023 I filed a Witness Statement on behalf of the Defendants.

8. I have been advised by Counsel for the Defendants and verily believe that the trial of this matter is to take place on the dates of the 23rd, 24th & 25th of January, 2024 at the Supreme Court of The Bahamas in New Providence before The Honourable Madam Justice Carla Card-Stubbs.

9. As a result of certain pre-arranged business commitments, I will be unable to attend the hearing in person on the said dates mentioned in 8 above to give oral evidence.

10. I have been advised by Counsel for the Defendants, and verily believe that in order for me to give evidence via video link or Zoom permission is required.

11. I have been advised by Counsel for the Defendants and verily believe that in the event that permission is granted for me to give my evidence via video line [sic] or some other means, it would greatly assist the Court and will not increase the cost of the proceedings. In the event I am unable to give evidence, then the Defendants will be prejudiced in that my evidence is in support of the Defences of the Defendants.

12. I have been advised by Counsel and verily believe that the use of video link or some other means for allowing me to give evidence will provide cost saving and will likely be beneficial to the court for its efficient, fair and economic disposal of the litigation in this matter.

11. The Defendants ground their application on Part 29, Rule 29.3 CPR which provides for the court to allow a witness to give evidence by video link.

12. The Defendants rely on the case of Garet O Finlayson and Mark Finlayson v. Caterpillar Financial Services Corporation and KURC Limited, SCCIV App. No. 97 of 2020 in support of the Court's discretion to order a remote hearing so long as the discretion is exercised reasonably and judicially and in the interest of justice.

13. The Claimant opposes the application on several grounds. Firstly, the Claimant points to the failure of the Defendants to serve the Notice of the Application in a timely manner. Given this Court's ruling on the Defendant's application, and taking into account the power of the Court to rectify matters and to abridge time (Part 26 CPR), it is not necessary to deal with this submission.

14. In relation to the substantive grounds, the Claimant submits that there is no compelling reason for Mr. Towell to give evidence by video link. The Claimant submits that the witness had over 6 months to put his business in order to attend

trial and that Defence Counsel ought to have dealt with any conflicts with the trial date in a timely manner. The Claimant further submits that she will be prejudiced if the witness were to be allowed to give evidence remotely since the Claimant wishes to cross-examine the witness extensively on his witness statement. The Claimant submits that to allow the witness to give evidence electronically “would jaundice the ability of the Court to make findings on the credibility of Mr. Towell which would be better afforded the court if the witness was present in person.”

15. In support of this point, Rosalyn Brown, Claimant, avers in her affidavit as follows.

6. Additionally, I have been advised by Counsel that to allow Mr. Towell to give his evidence by video link when all other witnesses are giving their evidence in Court before the Judge puts me at an extreme disadvantage as this case is likely to turn on the evidence and findings of fact to be made by the trial judge. To deny me the right to cross examine Mr. Towell in person in the presence of the Judge impacts me because it will impact the ability of the Judge to assess his credibility as a witness. I feel very strongly about this issue as my rights may be affected negatively due solely to the convenience of a witness and the inability of the Defendant to properly plan for this trial.

16. The Claimant relies on the cases of Gubarev and another v Orbis Business Intelligence Ltd and another [2020] EWHC 2167 (QB) and Jackson v Hayes & Jarvis (Travel) Ltd [2022] EWHC 453 (QB) in support of the submission that a remote hearing would impact the Court’s assessment of the Defence witness.

Jurisdiction to Order Remote Hearings

17. The Court has wide powers aimed at managing its process and moving matters to resolution in a just, expeditious, fair and cost-proportionate way. One such power is the power to control the nature of the evidence and the mode in which it is taken at trial. Specifically, Part 29 CPR provides, in part:

29.1 Power of Court to control evidence

The Court may control the evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means, as to the —

- (a) issues on which it requires evidence; and
- (b) way in which any matter is to be proved.

29.2 Evidence at trial – general rule

(1) Any fact which needs to be proved by evidence of witnesses is to be proved at —

- (a) trial, by their oral evidence given in public
.....

29.3 Evidence by video link or other means

The Court may allow a witness to give evidence without being present in the courtroom, through a video link or by any other means.

18. The Court has a duty to manage cases actively and this includes the appropriate employment of available technology.

PART 25 – CASE MANAGEMENT – THE OBJECTIVE

25.1 Court's duty actively to manage cases.

The Court must further the overriding objective by actively managing cases including —

....

- (m) making appropriate use of technology.

19. In exercising its discretion in these matters, the Court must bear in mind the Overriding Objective of the rules.

PART 1 - OVERRIDING OBJECTIVE OF RULES

1.1 The Overriding Objective.

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

(2) Dealing justly with a case includes, so far as is practicable:

- (a) ensuring 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 it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

1.2 Application of overriding objective by the Court.

(1) The Court must seek to give effect to the overriding objective when —

- (a) exercising any powers under these Rules;
(b) exercising any discretion given to it by the Rules; or

(c) interpreting these Rules.

(2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

1.3 Duty of parties.

(1) It is the duty of the parties to help the Court to further the overriding objective.

(2) In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure keep his duty under paragraph (1).

20. The Overriding Objective provides several factors that ought to be considered, where appropriate, in the exercise of a court's discretion. In determining whether to permit the taking of evidence remotely, a court must have regard to the relevant circumstances. So, for example, cost-savings is a factor relied upon by the Defendants in their application. Cost-savings can only be one relevant consideration in this instance. Another question that a court must ask itself is whether such permission should be granted in the interest of justice. This court must consider whether such a direction would result in a trial that would be fair as between the parties. A court is to ensure that such a direction would serve to ensure, as far as practicable, that the parties are on an equal footing. In such an instance it becomes necessary to consider, inter alia, the complexity of the issues, the nature of the evidence to be taken and the best way for this court to weigh and assess that evidence in order to make a proper determination in the matter. It is a balancing exercise.

Law and Analysis - Balancing Exercise

21. *Garet O Finlayson and Mark Finlayson v. Caterpillar Financial Services Corporation and KURC Limited* is a case where evidence in chief was taken during an in-person hearing and the matter adjourned for cross-examination. The resumption of the trial was delayed as a result of the global Covid 19 pandemic. The trial judge gave a direction that the trial would resume and continue remotely. That direction was appealed. The appellants contended that it was unfair to have

to conduct cross-examination remotely when evidence in chief was taken in person. They submitted that they had a legitimate expectation that cross-examination and re-examination would have been conducted in the same manner as examination-in-chief. However, the appellants did concede that they would have had no complaint if examination-in-chief had been conducted remotely. The Court of Appeal refused to interfere with the exercise of the discretion of the first instance judge. The President of the Court, Sir Michael Barnett, P., in delivering the judgment of the Court, said at paragraph 18:

“The case management discretion to take evidence remotely is wide and must be exercised based upon ordinary principles of fairness, and justice.”

22. In that case, the Appellate Court reviewed several Covid 19 protocols and opined that such a legitimate expectation may have been reasonable – though unenforceable – in ordinary times (paragraph 22). Even so, there could be circumstances that would justify the direction given.

23. The case of *Gubarev and another v Orbis Business Intelligence Ltd and another* [2020] EWHC 2167 (QB) is also a case decided in Covid 19 Pandemic circumstances. In that case, the matter was not heard remotely but the court had given certain directions for a live video feed of the proceedings to be provided. In considering the flouting of the court’s orders and issues relating to the professional conduct of counsel, the Divisional Court made the following observations.

50 During this pandemic, there have been temporary changes to the way in which parties and their representatives and others, including the media and the general public, have been permitted to obtain access to proceedings. Nonetheless, whether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm.

51 In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live

evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see, as Warby J did in the course of this hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

52 Once live streaming or any other form of live transmission takes place, however, the court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the courts are obeyed.

24. *Gubarev and another v Orbis Business Intelligence Ltd and another* exposes the possible difficulties with remote hearings and serves to indicate measures that may be necessary for a fair hearing. It does not, per se, serve to provide reasons against a direction for a remote hearing and, in fact, is helpful in highlighting the sorts of necessary measures that ought to accompany a direction for a remote hearing.

25. This court finds assistance and guidance in the case of *Jackson v Hayes & Jarvis (Travel) Ltd* [2022] EWHC 453 (QB).

26. In *Jackson v Hayes & Jarvis (Travel) Ltd*, the Defendants applied to have its expert witness and its witness of fact, both based in Kenya, give their evidence via video link, or, alternatively for directions for a hybrid hearing of the trial to permit those witnesses overseas to attend the hearing remotely while the witnesses based in the United Kingdom would attend in person. At that time, post Covid 19 Pandemic, there were restrictions on border-crossings that would cause the witnesses to incur necessary expenses and to spend longer times in trying to cross borders – such as quarantine periods. In balancing the interests of the parties and in considering the potential difficulties facing the Defendant in having the witnesses attend trial as well as the potential risks, Mrs. Justice Eady decided against a remote hearing and refused the Defendant’s application.

27. In that case, the learned judge considered that Court’s guidance note to the equivalent of this Court’s CPR Part 29.3 which allows for the court to give permission for the giving of evidence by video link:

18 Guidance is then provided at Annexe 3 to CPD 32, where the observation is made that, although the giving of evidence by witnesses by video can yield savings in time and costs, inevitably it is not as ideal as having the witnesses physically present in court: the “convenience” of evidence by video link should not dictate its use. Moreover, it is noted that a judgement is required in every case as to whether the use of technology such as video conferencing is likely to be beneficial to the efficient, fair and economic disposal of the litigation, in particular given that the degree of control a court can exercise over a witness at the remote site may be more limited than if that witness was physically before it.

28. Mrs. Justice Eady noted that, for practical reasons, it was in the interest of justice to convene and dispense with matters remotely during the coronavirus pandemic (paragraph. 19). However, the “default position remains, however, that hearings should take place in court unless there are good reasons to the contrary (see the observations of HHJ Pelling QC in *United Technology Holdings Ltd v Chaffe* [2022] 1 WLUK 240).”

29. The judge dismissed “convenience” as a deciding factor and went on to went on to consider the significance of the case to the parties.

23 I am bound to take into account that this is a case of significance to both sides, but (inevitably) in particular to the claimant. It is a case of high value and the two witnesses to which this application relates are obviously important and their evidence will be significant in the determination of the dispute between the parties.

26.I am left with, on the one hand, an absence of evidence to support the concerns expressed by the defendant, and, on the other, a final liability trial in a case of some significance and of some value where it seems that the court would be better served by being able to assess the evidence of the witnesses concerned in person.

30. Similarly, in this case before me, I am called on to conduct a balancing exercise.

31. The Defendant urges that to allow Mr. Towell to give evidence by video link would be economical. This factor is not challenged by the Claimant. It is often the case that the use of video link for the purpose of taking evidence is a cost-saving exercise. Cost-savings is one relevant consideration and cannot be determinative in this instance.

32. I must also consider whether this is a simple case suitable for convenient disposal by remote hearing. While the issues are easily and simply stated, the matter involves 4 Defendants with separate Defences. While it appears uncomplex, this is not a simple matter. The parties have joined issue on the material particulars. Three days have been set aside for hearing solely on the matter of liability.

33. I must also consider the significance and value of the claim to the parties. The claim before me is not insignificant. The Claimant seeks damages pleaded at \$2,910, 695.00 in the Amended Statement of Claim. The claim is for a breach of contract. On a perusal of the pleadings and witness statements, it is apparent that this court will be required to do more than simply construe any documentary representation of the alleged agreements. In determining liability, this Court will be called upon to assess what the parties say occurred in relation to their

interactions as it affects *whether an agreement was entered into as alleged or at all*. The nature of the Defence calls the agreement(s) into question. As I understand it from the issues joined, the matter does not stand or fall merely on the construction of an agreement or a document or on the interpretation of a statutory clause. The essence is whether an agreement was entered and the nature of that agreement. The witness statement of Mr. Towell itself speaks to this. As the Defendants assert, that witness statement makes it clear that Mr. Towell is a key witness in this matter. It will therefore be necessary for a court to weigh and assess his evidence and the credibility of same as well as the credibility of the witness. Such evidence and credibility can undoubtedly be weighed remotely but is that the appropriate course of action in these circumstances? My decision is that it is not. There can be no gainsaying that a court is best placed to complete this task when it can observe a witness in person and when the parties are placed on equal footing in like circumstances to present and challenge the evidence of the other side by thoughtful cross-examination. An in-person hearing in the instant case would serve to ensure, as far as practicable, that the parties are on an equal footing. The default position of holding hearings in person remain the default position for very good reasons. A party applying to have evidence taken remotely ought to supply a court with very good reasons as to why that is an appropriate course.

34. No compelling reason has been advanced on behalf of the Defendants as to why Mr. Towell cannot be present in a jurisdiction that he has submitted to and in which one of the Defendants has made a claim via a Counterclaim. The only reason advanced is that he has pressing business obligations. I find that reason unacceptable when a trial date has been set 6 months in advance. It seems to me that when there is a conflict of dates, counsel for the Defendant ought to confer with Counsel for the Claimant to find a date convenient to the parties and which is available on the court's calendar.

Conclusion

35. Upon the ordinary principles of fairness and justice, there is no justification to make the order sought by the Defendants. The application of the Defendants for the witness to give his evidence without being present in the court room is dismissed.

36. I note that the Defendants have suggested, without more, that if this application is refused, that the Defendants would not be able to have the evidence of Mr. Towell in support of the Defence if the trial were to proceed on the set dates. I also note that the Claimant has, in its opposition to the application, made room for the possibility of finding another trial date to facilitate the Defendant's witness. In the circumstances, I invite both sides to confer with a view to same. I take this opportunity to remind Counsel on each side that they too have a duty to further the Overriding Objectives of the CPR. In this case, I encourage the collaboration envisaged by the rules.

Costs

37. I invite the parties to address me in writing on the incidence of costs, including quantum. This court will assess the costs concerning this application.

Dated this 22nd day of January, 2024

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs, J.', with a stylized flourish at the end.

Carla D. Card-Stubbs, J