COVID-19: the end to face-to-face hearings?

By March 2020 the impact of COVID-19 was becoming evident on litigation before various levels of court within Australia and it seems 2021 may continue as a similarly disrupted year for the courts with a potential number of unforeseen 'circuit breaker' lockdowns to navigate.

Although it is some 12 months since the beginning of the pandemic, the courts continue to grapple with its effects.

Consequently there is a growing body of case law dealing with the approach adopted by the Australian courts, in particular when it comes to questions of adjournment of in-person hearings.

This Insight considers the general principles applied by the courts when dealing with the impact of COVID-19 on the cases before them and whether current changes are expected to become a lasting feature of the justice system.

Australian case law concerning the impact of COVID-19

David Quince v Annabelle Quince and Anor [2020] *NSWSC 326* (19 March 2020)

The case concerned allegations that certain transfers of shares purportedly executed by the plaintiff were forged. The plaintiff applied to vacate the trial hearing date on various grounds, including that cross examination of all the witnesses would be required to be undertaken by video link.

Counsel for the plaintiff argued that he wished to be able to cross examine the defendant in a conventional setting, and that in particular the defendant's demeanour in answering the allegations was crucial in assessing issues of credibility.

It was held that, due to the seriousness of the allegations and the equivocally opposing handwriting expert evidence, the demeanour of the witness would play a significant part in determining the allegations. Cross-examination could not therefore be adequately carried out via video-link. Sackar J held that to impose a regime of conduct by video-link was antithetical to the administration of justice if the regime was to work an unfairness upon any party. The hearing dates were vacated.

JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd [2020] WASCA 38 (25 March 2020 hearing date, 30 March 2020 judgement)

As a result of the COVID-19 pandemic, on 18 March 2020 the Chief Justice of Western Australia issued a notice regarding conduct in the WA Court of Appeal, noting that all appearances in person had been suspended and, unless otherwise ordered, hearings were to be conducted electronically.

The respondent applied for an adjournment of the appeal hearing listed for 27 March 2020 on the basis that a hearing by telephone would be 'manifestly inadequate' or by video 'inadequate', for the following reasons:

- the respondent would be at a significant disadvantage if senior counsel could not see and 'read' the court referring to the benefit of non-verbal communications;

- the respondent was 'entitled' to have a normal hearing;
- the respondent had a number of client representatives and additional solicitors located overseas and interstate. Procuring timely instructions would therefore pose a significant difficulty;
- senior and junior counsel, whilst located in Melbourne, were unable to co-locate due to a 14-day mandatory isolation period being served by senior counsel's son whom had recently returned from New York;
- client representatives were entitled to observe the appeal hearing and communicate with counsel through their solicitors at the hearing; and
- unless a party was able to observe and participate in an appeal in a conventional manner a party was likely to feel much more aggrieved in the event of an adverse outcome.

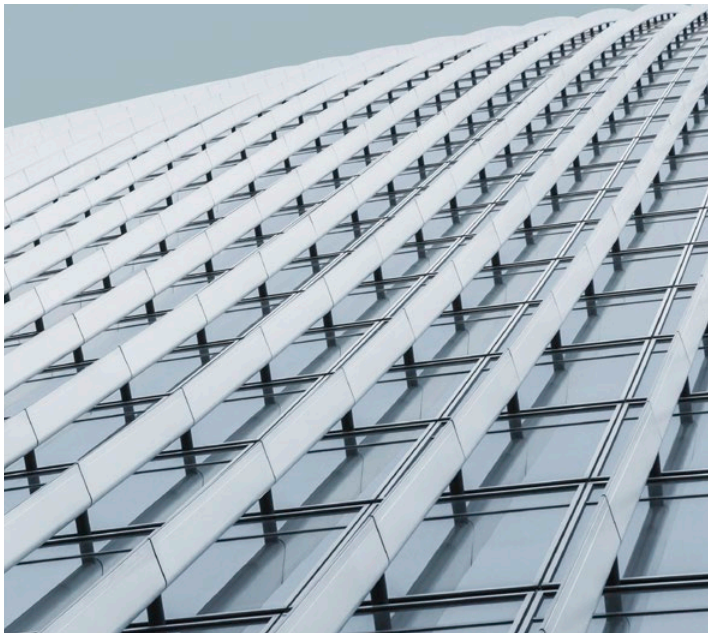
The WA Court of Appeal rejected the submissions on the basis that procedural fairness required that a party is provided with an adequate opportunity to properly present their case. It was the Court's experience that conduct of an appeal hearing by telephone provided for comprehensive dialogue and debate between the bar and bench as to the issues raised.

Whilst the WA Court of Appeal accepted that the COVID-19 pandemic meant it was impracticable for parties to travel, counsel for the respondents could appear at the hearing by telephone from Melbourne, alternatively, if arrangements could be made for both parties to appear, by video-link.

The WA Court of Appeal found there was no real risk of material prejudice by the inability of senior counsel to co-locate with junior counsel during a telephone appeal hearing. Whilst inconvenient it was possible for counsel to communicate electronically.

Given there was no new evidence to be adduced in the appeal, and that the appeal was being conducted on agreed facts with agreed documents, the WA Court of Appeal did not accept that there was a real risk that the respondent would be materially prejudiced due to difficulty in procuring instructions during the hearing. It was suggested that leave could be granted to file short supplementary submissions post hearing if necessary.

The WA Court of Appeal accepted that whilst justice must not only be seen to be done, in the current circumstances the WA Court of Appeal was unable to perceive any real risk of practical injustice in proceeding with the hearing by telephone. The application for adjournment was dismissed.



Capic v Ford Motor Company of Australia Limited (Adjournment) [2020] FCA 486 (9 April 2020 hearing date, 15 April 2020 judgement)

An application was issued by the respondent for adjournment of a trial set down for six weeks from 15 June 2020. The case commenced in 2016 and had previously been set down for trial twice.

In light of the COVID-19 crisis, the respondent argued that the trial ought not proceed, and instead be listed for later in the year. In support of its adjournment application the respondent raised a number of difficulties which may be encountered if the trial proceeded.

Technological limitations

The respondent pointed to the problem of poor internet connections and access to software. Perram J accepted that there would be participants with excellent connections and those that were not so good.

Difficulties with the internet were to be added to the list of reasons why witnesses get shuffled around, similarly to previous issues with delayed flights. Perram J referred to recent experience of a virtual trial noting that whilst problems of frozen screens and people dropping out completely was present from time to time, and was aggravating, they were tolerable.

Physical separation of legal teams

The respondent took issue with practitioners not being together in one place for a trial. It was common place for junior counsel to sit behind senior counsel to convey important information.

Perram J accepted that the ability to do this when everyone was at home is degraded, however reference was made to a virtual hearing conducted a month prior where senior and junior counsel communicated via WhatsApp.

Expert witnesses

The respondent raised issues regarding briefing of expert witnesses. It was accepted that in the lead up to a trial conferences with witnesses take place in person often over days and that doing this on a virtual platform was slower, more tedious and expensive. It would not however result in a process which was unfair or unjust.

In terms of expert 'hot tubs' in different jurisdictions, it was accepted that it was more difficult for experts to confer to prepare a report or give concurrent evidence but the problem was not insurmountable.

Experts could confer beforehand on virtual platforms and the Court could sit at different times to resolve time zone difficulties. The idea of two witnesses being examined at the same time on a virtual platform is no doubt challenging but Perram J did not think that it could not be attempted or that it would be unfair or unjust.

Lay witnesses

Various practical problems exist with lay witnesses located remotely in their homes. For example, in relation to cross examination, Perram J noted it was not possible to see if there was someone out of ear shot coaching a witness. In a class action about defective gear boxes, as opposed to a fraud trial, the problem was not however perceived as too acute.

Logistical difficulties were also raised given that the applicant was proposing calling 50 witnesses to give varying evidence. Perram J stated that whilst there are authorities which support the unsatisfactory nature of cross-examination by video-link those statements were not made in the present climate or taking account of cross examination platforms such a Microsoft Teams, Zoom or WebEx.

Perram J's impression of those platforms was positive, in particular he commented: "I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court."

What is different and significant is that the use of video technology reduces the chemistry which may develop between counsel and the witness. This is allied with the general sense of reduced formality in the proceedings which is undesirable.

Trial length and expense

Perram J accepted the respondent's submission that conducting the trial in a virtual environment would prolong the hearing and thereby increase its expense. However, there is no guarantee that the situation will be any better in six months' time. It is not therefore consistent with the overarching administration of justice to stop the work of the courts for such a period.

Perram J refused the adjournment concluding:

> "… [u]nder ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try."

Australian Securities and Investments Commission v GetSwift Limited [2020] FCA 504 (9 April 2020)

Litigation was commenced by the regulator together with a class action canvassing substantially the same issues. The two proceedings were listed for sequential hearings in 2020.

Adjournment was sought on the basis of similar reasons raised in *Capic* including:

- the availability of two key witnesses and need to travel between New York and Australia and time zone difficulties;
- the proceedings involved ASIC calling 41 witnesses, 31 of which were proposed to be the subject of cross examination;
- unreliability of technology;
- the Court would be deprived of seeing witnesses in person, with the disadvantage of being unable to assess demeanour in circumstances where credit is likely to be in issue;
- there would be difficulty in senior counsel taking instructions and collaborating with junior counsel for the purposes of conducting the case and during cross examination;
- adjournment would likely result in a fixture in late 2021 or early 2022. There was no real prejudice in such delay and in the interim useful work could be undertaken to narrow the issues; and
- the bespoke circumstances of the ASIC proceeding being a civil penalty proceeding is highly significant when one comes to assessing whether it would be just to conduct the litigation.

Lee J made a number of preliminary observations, in particular that if the arrangements being put in place to hear the matter resulted in a trial that was 'second-rate' or substandard, then he would not proceed.

His Honour refused the adjournment application addressing the primary issues as follows:

- unless the two key witnesses could give evidence remotely from New York the hearing would not proceed. It was wholly unrealistic to expect them to travel to Australia. As to time zone differences, His Honour was willing to sit outside of Court hours to ensure witnesses give evidence at a convenient time;
- His Honour was conscious of the large number of ASIC witnesses proposed to be called and the demands on the defendants to cross examine them. Evidence was, however, relatively confined and the evidence in chief had already been filed.
- Whilst it was acknowledged that there would be a disadvantage in junior counsel being unable to tug senior counsel to remind him of some question or document, there were other ways to communicate in real time. Short adjournments prior to the conclusion of cross examination of any witness could also be implemented if required;
- the parties were to work together, and with the courts, to ensure technology used is of sufficient quality to minimise issues. If unexpected difficulties arise the Court will show latitude in resolving issues;
- to the extent demeanour plays an important role in assessing the evidence of the witness His Honour stated:

  "… my experience, particularly in the recent trial that I conducted, is that there is no diminution in being able to assess the difficulty witnesses were experiencing in answering questions, or their hesitations and idiosyncratic reactions when being confronted with questions or documents. Indeed, I would go further and say that at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and (in the Court in which I am currently sitting) distant witness box;"

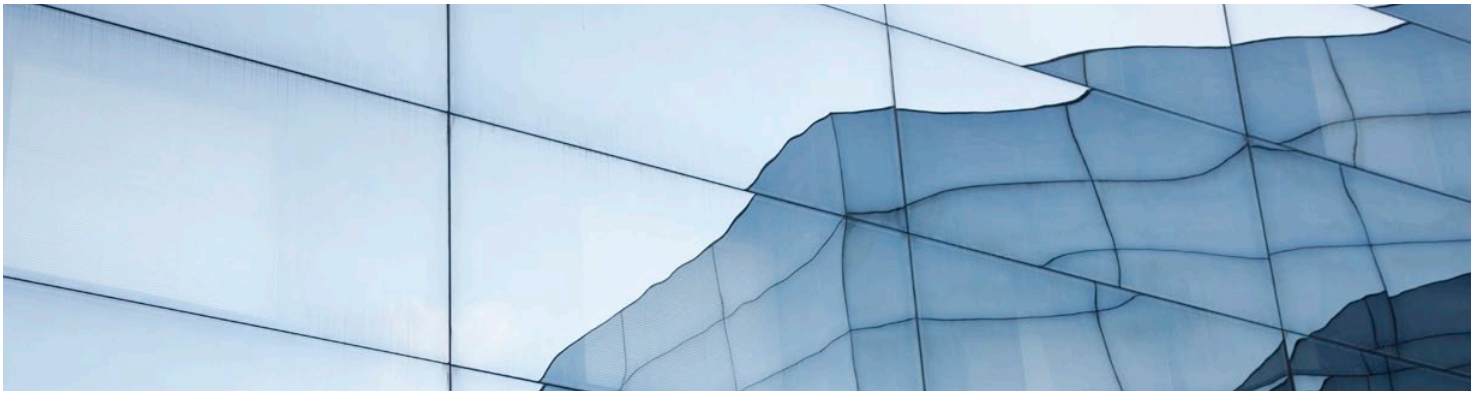
- it was accepted that there may be difficulty taking instructions during the course of evidence but that this does not create insuperable difficulties;
- as to a delay in the hearing, His Honour's opinion was that the work of the courts needed to go on. Whilst work may continue if the hearing was delayed, the substantive work takes place at the hearing; and
- His Honour was acutely aware of the seriousness of the ASIC proceedings and had taken into account that a party might feel aggrieved about an outcome which they subjectively considered as less than ideal. Even if His Honour was satisfied that justice was capable of being done by the case proceeding, it was noted as important that it is perceived to be done by those involved in it. Lee J quoted, the Court of Appeal in the case *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd,* stating he was "unable to perceive any real risk of practical injustice" of at least such a dimension as to mean that the case ought not proceed.

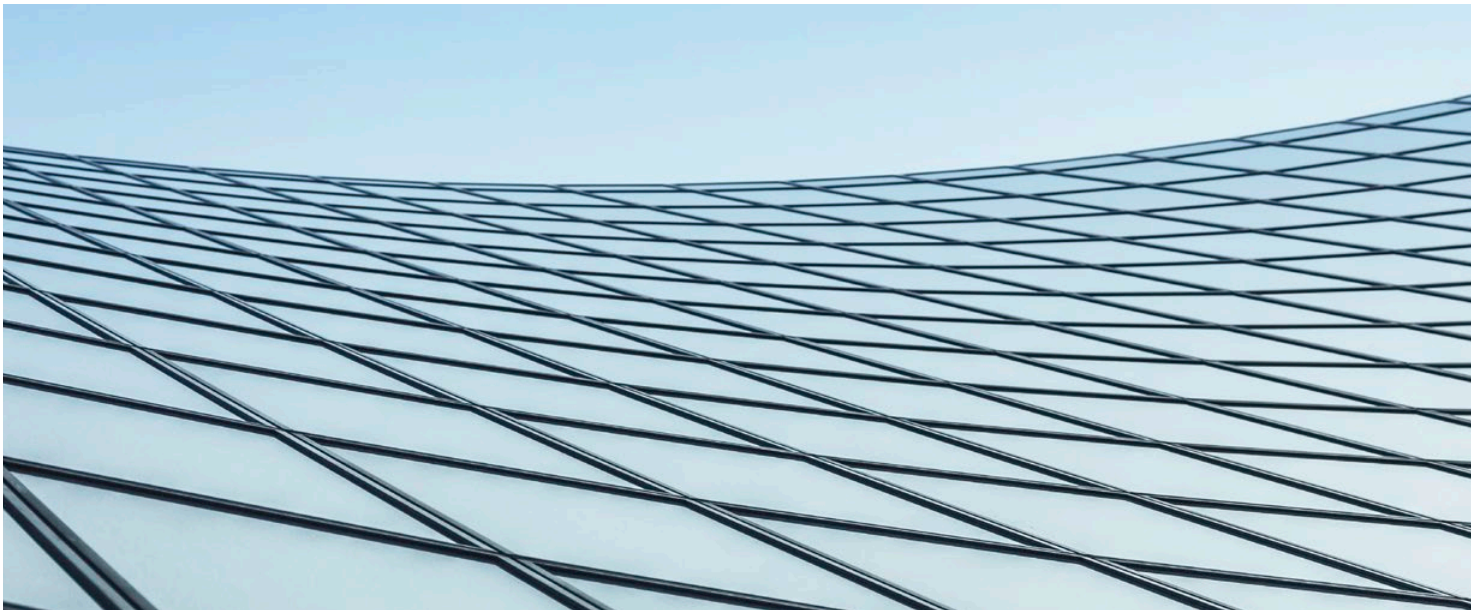
Ascot Vale Self Storage Centre Pty Ltd (in liq) v Nom De Plume Nominees Pty Ltd [2020] *VSC 242* (11 May 2020)

The plaintiff made an application for an insolvent trading exoneration defence to be heard separately. The plaintiff submitted that the issues required an assessment of honesty and argued that it is 'inapt' to have such issues tried when parties are operating by video remotely and relied upon the determination of *David Quince v Annabelle Quince*.

In considering whether the trial could be conducted by video link, McDonald J dismissed the plaintiff's application commenting:

> "I do not accept that this case is authority for the proposition that a trial conducted by video link should not proceed wherever there is a question of credit to be determined. Whether trial by video link is appropriate is a matter to be determined on a case by case basis. I am not satisfied that, if it is necessary for the trial to be conducted by way of video link, the proceedings cannot be fairly and properly conducted."





Ozemac Pty Ltd v Jackanic & Anor [2020] VCC 790 (11 June 2020)

The case was listed for trial on 24 March 2020. During initial presentation of the case it became apparent that the first defendant was suffering from a respiratory illness. Due to concerns regarding COVID-19 the hearing was adjourned.

Following the adjournment there was correspondence about the revised trial date. The plaintiff was happy to proceed by video link. However the defendant wished to have the matter listed face-to-face in the usual way.

The defendants argument for an in person trial related to the assessment of credit of the principal witness. The plaintiff relied upon various authorities dealing with COVID-19 issues demonstrating that trial by video link is not necessarily a compelling basis for an adjournment. Reference was made to *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* supporting the proposition that a party is not entitled to have a face-to-face hearing.

Reference was made to *Capic v Ford Motor Company of Australia Limited* which concerned proposals to call some 50 witnesses compared to the current case with only six witnesses to be called. *ASIC v GetSwift Limited* was also mentioned in relation to demeanour of witnesses.

Given the matter was part-heard in March 2020 and may not be able to resume in a normal face-to-face hearing for at least nine months, Her Honour held it was appropriate that the matter proceed as soon as reasonably practicable by way of video link.

The only ground relied upon by the defendants in opposing such course of action was assessment of witness creditability. It had not been demonstrated, nor was it Her Honour's experience, that the capacity to determine the credibility of a witness is unduly impacted or prejudiced by way of proceeding by video link such that a fair trial cannot be conducted. In fact, as noted in *ASIC v GetSwift Limited t*here may even be a slight advantage.

Haiye Development Pty Ltd v Commercial Business Centre Pty Ltd [2020] *NSWSC 732* (12 June 2020)

The plaintiffs made an application to vacate the hearing date on the basis that three principal witnesses are citizens of, and residents in, the People's Republic of China and would need to give evidence using interpreters. The plaintiff's argued that they were unable to travel to Australia for the hearing and, even if it were technically feasible for them to come to Australia, they did not want to do so for health reasons.

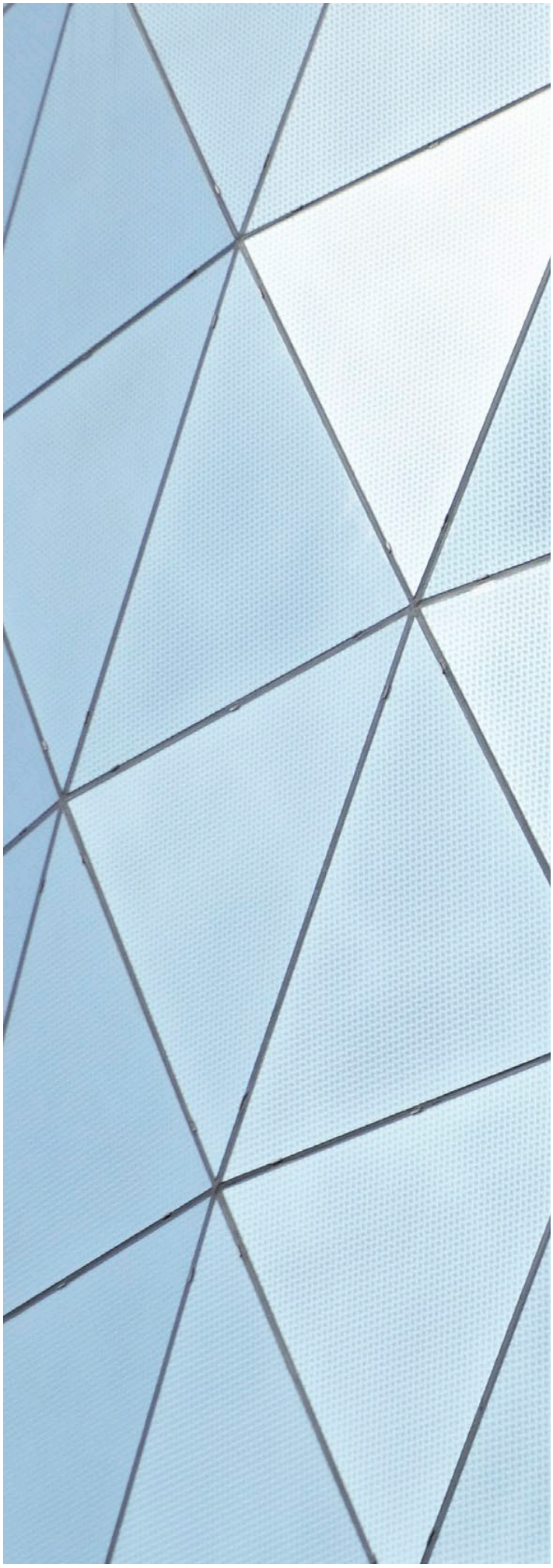
Further, Chinese law does not permit them to participate in the hearing by audio visual link and, even if it did, the issues in the case make it entirely unfair that they be required to give evidence and instructions by audio and visual link, when the defendants will be able to present their evidence and give instructions in English, even if required to participate virtually.

The defendants relied upon a number of recent procedural decisions including *ASIC v GetSwift Limited* and *Capic v Ford Motor Company of Australia Limited* that have ruled that parties may have to accommodate unconventional approaches to the conduct of hearings.

The WA Court of Appeal agreed with the approaches in each of those cases and noted each depended on its own facts. His Honour accepted the plaintiffs' position that the concatenation (i.e. linked series or chain) of circumstances that the plaintiffs have to face in the case places it in an exceptional category and it would be unfair to them for the Court simply to reject the application.

Key takeaways from Australian Case Law

- The courts are generally keen to avoid postponing cases and wish to see justice being delivered. There is significant emphasis placed on the parties and the courts at least trying to proceed by way of virtual hearings. This is particularly in light of the indeterminate and evolving nature of COVID-19 (*Capic v Ford Motor Company of Australia Limited).*
- To achieve this objective, virtual hearings by telephone and video are accepted by the courts as satisfactory *(JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd) (Toyota Material Handling Australia Pty Ltd v Cardboard Collection Service Pty Ltd [2020] NSWDC 667).*
- Whilst the courts acknowledge the challenges and limitations of hearings using virtual platforms to conduct a trial for example frozen screens, access to technology and parties dropping out overall it appears that the courts recent experience of trials conducted virtually has been satisfactory *(Capic v Ford Motor Company Australia Limited).*
- The courts have provided examples of use of technology platforms such as WhatsApp to facilitate inter party communications during virtual hearings, and use of Zoom and Microsoft Teams for the purpose of cross examination *(Capic v Ford Motor Company Australia Limited).*
- In relation to witness cross examination, inability of a court to see and hear witnesses in person does not necessarily lead to a diminution in a court's ability to assess the demeanour of the witness. Use of platforms such as Microsoft teams, Zoom or WebEx was acknowledged as positive to the extent that the perception of facial expressions may be greater than in court. This is however to be viewed against the diminution in chemistry and general sense of formality (*Capic v Ford Motor Company of Australia Limited) (ASIC v GetSwift Limited).*
- Courts are to give practitioners latitude to raise issues concerning COVID-19 as and when impacted (*Kemp v Westpac Banking [2020] FCA 437) (Seven Sisters Vineyard Pty Ltd v Koings Pty Ltd* [2020] VSC 161).
- Although, this is all subject to the precondition that justice must not only be done but perceived by those involved to be done *(JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd) (ASIC v GetSwift Limited).*
- If a court feels justice would not be served by a virtual hearing, or it would result in a second rate hearing, then the matter should not proceed and a hearing date may need vacating until such time as hearings in person can resume *(ASIC v GetSwift Limited) (Haiye Development Pty Ltd v Commercial Business Centre Pty Ltd).* An example of a situation where this may arise is a fraud case where credibility and demeanour of a witness is a primary issue *(David Quince v Annabelle Quince).*



Arbitration comparison

Relevantly, it is not just the courts evolving and adapting to operate in a COVID-19 world. The revised International Chamber of Commerce 2021 Arbitration Rules (2021 ICC Rules) recently came into force and apply to all ICC arbitrations commenced on or after 1 January 2021. Whilst the 2021 ICC Rules are not substantively different to their predecessor rules, there are a number of important changes regarding virtual hearings and primacy of electronic communications.

In relation to virtual hearings, modified Article 26(1) of the 2021 ICC Rules introduces in express terms the possibility of holding virtual hearings. Virtual hearings had become standard practice during the height of the COVID-19 pandemic. The amended article also clarifies that a hearing shall not necessarily be held, unless any party so requests, or if the arbitral tribunal deems it necessary.

New Article 26(1) of the 2021 ICC Rules provides:

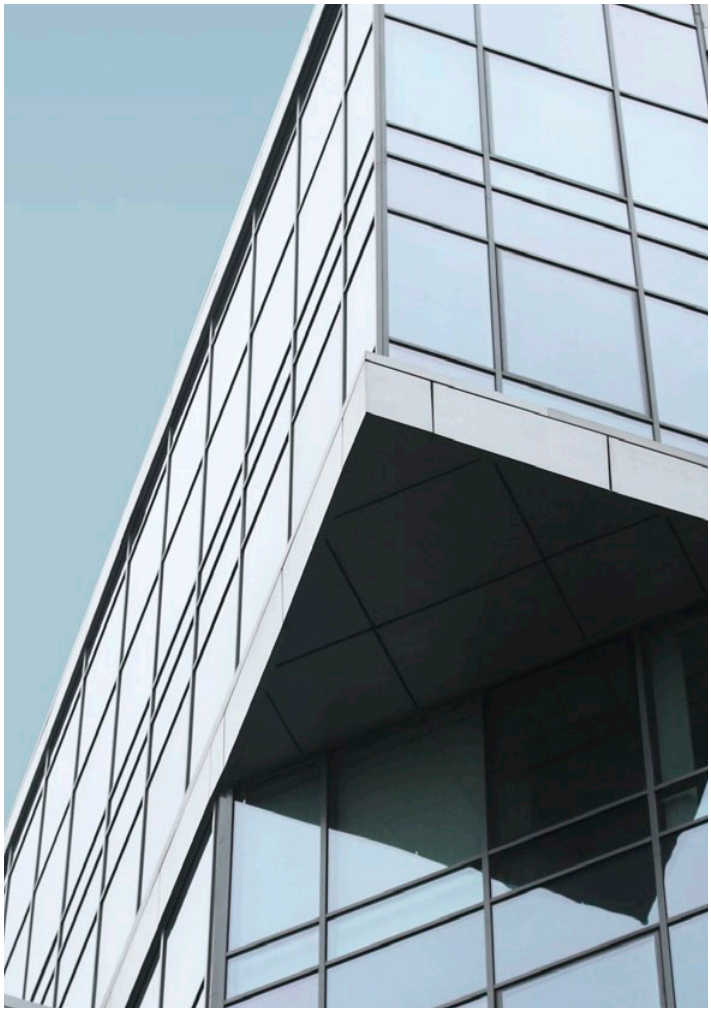
> **"A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties.** When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, **that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication."** (emphasis added)

This is substantially different to the old Article 26(1) of the 2017 ICC Rules which provided:

> "When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it."

Further, Article 3(1) of the 2021 ICC Rules provides the default rule is that "all pleadings and other written communications" are to "be sent to each party, each arbitrator, and the Secretariat" via electronic means, whereas, under the 2017 Rules they had to be "supplied in a number of [hard] copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat."

These amendments are part of the move towards virtual hearings becoming standard practice together with digitalisation of the arbitral process.



The future of physical hearings before the courts

The courts reacted promptly to the COVID-19 pandemic and, although the courts have progressively embraced technology for some time now, including allowing for electronic filing, video link and audio link hearing arrangements and electronic hearing books, the COVID-19 pandemic has caused a significant impetus to completely virtual hearings.

The recent decisions of the courts suggest that there is a reluctance to allow the adjournment of trials in favour of in-person attendance and the courts are satisfied that the challenges posed by virtual hearings can be overcome and do not prevent justice being done.

However, as the restrictions ease and the effects of the COVID-19 pandemic become less widespread, not much has been said about the future of physical hearings and whether the courts will continue, if desired by the parties, to allow virtual hearings or hybrid virtual hearings (a combination of physical and virtual hearings).

Although this question remains unanswered, it appears the courts may be more flexible and satisfied with attendance being virtual going forward having successfully managed virtual hearings thus far.

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