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IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
[2022] EWHC 453 (QB)



No.QB-2019-004317

The Royal Courts of Justice  
Strand  
London, WC2A 2LL

Thursday, 27 January 2022

Before:

MRS JUSTICE EADY DBE

B E T W E E N :

ANITA JACKSON

Claimant/Respondent

- and -

HAYES & JARVIS (TRAVEL) LTD

Defendant/Applicant

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MR R. WEIR QC (instructed by Aspire Law LLP) appeared on behalf of the  
Claimant/Respondent.

MR J. HAWKINS (instructed by Kennedys Law LLP) appeared on behalf of the  
Defendant/Applicant.

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J U D G M E N T

MRS JUSTICE EADY:

### **Introduction**

- 1 This is the hearing of the defendant's application, made on 19 January 2022, by which it is requested that the defendant's expert and its witness of fact, both based in Kenya, are able to give their evidence via video link, or, alternatively that directions be given for a hybrid hearing of the liability trial in this matter, such that those witnesses can attend the hearing remotely. The application concerns a hearing that has been listed for three days, in a trial window from 3 February to 13 April 2022.
- 2 The defendant's application is supported by two witnesses from Mr Gareth Thomas, the solicitor with conduct of this case on behalf of the defendant. The claimant's position is explained in a witness statement from her solicitor, Ms Siobhan Thomas.
- 3 The parties have been represented before me today by counsel who have conduct of this matter and will be representing their respective clients at trial.

### **The Background**

- 4 By her claim in these proceedings the claimant, who is now aged 45, claims damages for personal injury and consequential losses following an accident that occurred on 8 December 2016, while she was staying at the Baobab Beach Resort ("the Resort") in Kenya. The defendant is a UK-based tour operator that organised the accommodation as part of a package holiday.
- 5 I am told the claimant suffered life changing injuries as a result of the accident and is now paraplegic. Her claim against the defendant in these proceedings is estimated by her advisers to have a value in excess of £5 million. The claim was issued on 3 December 2019, and it is apparent that liability is very much in issue.
- 6 Following a CMC before Master Cook on 25 March 2021, directions were given for a split trial, with the parties being given permission to call experts to give oral evidence as to the relevant local standards and/or regulations to be applied in determining the duty and standard of care owed to the claimant in the relevant circumstances. As for the mode of hearing, it was directed that the trial on liability would be listed before a judge sitting at the Royal Courts of Justice.
- 7 It is the defendant's intention to call evidence from Mr Silvester Mbendi, who was then the manager at the Resort, as well as expert evidence from Mr Mohammed Munyanya, who is an architect. Both witnesses live and work in Kenya. Mr Mbendi has now moved and is no longer employed at the Resort but still works in Kenya; it is intended that he will give evidence in relation to the claimant's allegations regarding the building and as to health and safety practices at the resort. I understand these are matters that are central to the issue of liability in this case. It is also apparent that there is a significant dispute between the parties' respective experts.

### **The Application and the Parties' Submissions**

- 8 The defendant applies for both Mr Mbendi and Mr Munyanya to attend court remotely to give their evidence, submitting that it is proportionate for them to give their testimony by

video link rather than require that they travel from Kenya to London to give evidence in person. The defendant therefore makes this application under CPR 32.3, or alternatively asks the court to use its case management discretion to hold a hybrid hearing of the liability trial with those based overseas attending by video link and those based in the UK attending in person.

- 9 The defendant's desire for its witnesses to give their evidence by video link from Kenya was only raised with those acting for the claimant on 18 January 2022. As the defendant observes, however, the permission given to call expert evidence was dependent upon whether there remained points of dispute between the experts, and the joint statement of the parties' experts was only produced on 7 January 2022. That, it contends, was the point at which the extent of the disagreement could be discerned (I note, however, that this does explain why the issue relating to the witness of fact might not have been identified earlier).
- 10 The claimant resists the application, contending that no good reason has been identified as to why the defendant's witnesses could not attend the trial in person, and submitting that the interests of justice would obviously be best served by the giving of live evidence by all witnesses in this matter.
- 11 In responding to the claimant's objections, in Mr Thomas's second witness statement, it is explained that it is the defendant's understanding that the witnesses may face restrictions on re-entry to Kenya, and that - in both entering the UK and in returning to Kenya - current rules require that travellers must be fully vaccinated and they must present negative tests (possibly PCR tests) and certification if they are not to face quarantine periods at government facilities at their own cost (either on entry to the UK or re-entry to Kenya). Mr Thomas makes the point that, if the witnesses were unable to fulfil any of the requirements that are in place, there would be a risk that the trial would be adjourned entirely due to the witnesses being in quarantine. It is also said that the defendant's expert witness considers a visa would be required for his travel and the granting of such a visa would usually involve an interview process, thus adding a further layer of bureaucracy to the requirement that the witnesses attend trial in person.
- 12 Mr Thomas explains that if the witnesses were required to attend trial in person, they would need to make arrangements to arrive in the UK on 2 February and would require seven days away from work and family. They would have to take a 13 hour flight and any delay in transit, boarding or entry might mean they would not arrive on time; all that is to be seen in the context of the ongoing risk of contracting coronavirus during those travels.
- 13 In respect of the lay witness, Mr Mbendi, Mr Thomas makes the point that he would require a half day to a full day off work to give his evidence in any event and would need to request leave to attend the trial which it is said:

"He is willing to do as long as he can attend remotely. I do not know if he will be able or willing to take a full week off work or whether his new employer would grant that request".
- 14 As for the expert witness, Mr Munyanya, he would be likely to be required for two days if attending remotely, which would save him five additional days of travel away from work and family.
- 15 Mr Thomas further points out that all of this assumes that there is availability and that the necessary flights can be arranged and that the witnesses can meet vaccination, testing and visa requirements. He observes that they may have work, family or other commitments, let

alone any health issues that may restrict them. Those are factors that need to be taken into consideration, in particular, because the court would not be able to summon witnesses in Kenya to attend as they would be outside of the jurisdiction; they may simply take the decision not to make the journey.

- 16 As for the interests of justice, the defendant does not agree that the remote attendance of these witnesses in this case risks injustice, pointing out that there is no question that could not be asked of the witnesses remotely; nor is there any document that cannot be seen electronically by witnesses when giving evidence, and contending that the greater risk of injustice lies in witnesses not being able to attend or in the trial being adjourned entirely as a result.

### **Discussion and Conclusions**

- 17 By CPR 32.3 it is provided that:  
“The court may allow a witness to give evidence through a video link or by other means”.

It is a provision consistent with CPR 1.4(2)(k) which states that, in furthering the overriding objective, the court may make use of appropriate technology.

- 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.
- 19 Since March 2020, all those involved in litigation in this country have acquired a ready familiarity with remote hearings, hybrid hearings, and with the giving of witness testimony by video link. That, however, has reflected the difficulty in proceeding with trials at a time when there have been very serious, public health concerns relating to the conduct of in-person trials; adjourning trials pending the resolution of the coronavirus pandemic would inevitably have led to delays that could have jeopardised the court’s ability to do justice. 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).
- 20 The parties have drawn my attention to various cases in which the courts have permitted evidence to be given by video link, in particular during the course of the coronavirus pandemic. In each of those cases, however, that has either been an agreed course or the judgments provided have indicated the reason why it was necessary or appropriate to permit evidence to be given by that means, rather than in person, in those particular circumstances. Inevitably, the decision in each instance will be fact and case specific.
- 21 In the present case, the application I have to consider makes a number of points as to the potential difficulties that might face the defendant in ensuring its witnesses attend the trial in person. I do not underestimate those potential difficulties and, if convenience were the only (or, indeed, even the primary) consideration, then I accept there would be a very good basis for directing that that evidence be given remotely. I also accept that there are potential risks in requiring the witnesses to attend in person in the light of the continuing health risks posed

by the coronavirus; all international travel presents potential risks at present, even though the steps that have been taken under the vaccine programmes in different countries may have mitigated those risks to a large extent.

- 22 All that said, the risks identified are but *potential* risks. No evidence has been presented that persuades me that I should proceed on the assumption that they will be realised. Mr Thomas assumes that the witness of fact may be reluctant to attend in person, but that question does not appear to have been investigated with Mr Mbendi. Certainly, there is no evidence before me that either witness has refused to attend the trial in person or will face insurmountable difficulties in attending before a judge at the Royal Courts of Justice in London for this trial. If there were evidence to that effect, then I can see the balance may well tip in favour of the defendant's application. It seems, however, that the application has arisen because there may have been an assumption that the suggestion that the witnesses give evidence remotely would simply be agreed and that the court would have no difficulty with that course; faced with a disagreement in this respect, and having then to make the necessary application, it appears that the defendant has not fully investigated the position as yet. On the material before me, the application is premature.
- 23 Moreover, when I consider the other side of the balance, 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.
- 24 Thus, this is to be the final hearing on liability in a case of significance and involving substantial damages. There is no immediate or direct evidence to suggest that the trial will be jeopardised if the witnesses are required to attend in person. The witnesses' evidence will - to the extent I can form a judgement on this question at this stage - be more easily given in person, in particular when (as seems likely) referring to photographs and plans. Whilst I do not suggest that the witnesses in question could not fairly give that evidence (or that the court could not justly assess that evidence) if the testimony was given by video link, it will certainly be easier both for counsel asking questions, and for the judge who has to weigh the evidence and determine this case, if it is given in person.
- 25 For completeness, I also observe that I have been provided with any information about the steps that it is envisaged would be put in place as to where and how the witnesses will be giving evidence in Kenya, so as to assure the court of the safeguards that would be in place to manage that evidence; in this regard, I note the observations of the President of the Queen's Bench Division in the case of *Gubarev & Anor v Orbis Business Intelligence Ltd* [2020] EWHC 2167.
- 26 Ultimately, this application requires the court to carry out a balancing exercise. Doing so in this instance, and at this stage, 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. For all those reasons, at this stage and on that basis, I refuse the application.
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**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.