WHETHER TO PROCEED WITH A CIVIL PROCESS REMOTELY: UNIVERSAL LESSONS FROM AUSTRALIA DURING THE COVID-19 PANDEMIC

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SUMMARY

This article considers Australian case law regarding testimony given by way of video link and the conducting of remote civil processes in the time prior to the COVID-19 pandemic, as well as during the pandemic and thereafter. The article discusses the various considerations taken into account by the courts in deciding whether or not to proceed remotely with civil processes. The author examines issues regarding whether to use video-conferencing, including the importance of the evidence and the architecture of the physical courtroom. The various issues facing lawyers in running a case remotely, including document management and the physical separation of legal teams, are also considered. The author looks also at issues facing the parties such as trial length, cost and the right of parties to be present, as well as issues facing other role players in the process, and issues pertaining to the integrity of the process. Lastly, issues relating to the administration of justice, such as access to justice and the open justice principle, are dealt with. The author concludes by commenting on the way forward and the lessons that can be extracted for South Africa.

1 INTRODUCTION

This article considers Australian case law regarding testimony given by way of video link and the conducting of remote civil processes in the time prior to the COVID-19 pandemic,[1] as well as during the pandemic and thereafter. In the conclusion, there is some reflection on what the position in the future is likely to be. The article focuses on the considerations taken into account by Australian courts in deciding whether to allow evidence by video link, and whether to order that a trial proceed remotely in the face of opposition to this. The article is limited to considering civil processes being heard by a

[1] In early 2020, after a December 2019 outbreak in China, the World Health Organisation identified SARS-CoV-2 as a new type of coronavirus. It was named COVID-19. The outbreak quickly spread around the world, becoming a pandemic. The first confirmed cases in Australia came in late January 2020. As at March 2021, the total number of cases reported was 29 046, with 909 COVID-19-related deaths recorded.

judge. Considerations that may be particularly relevant to jury trials are not discussed in this article because South Africa does not run jury trials.

Australia was chosen as the case study because taking evidence by way of video-conferencing is relatively well established there. The sections empowering a court to take evidence by way of video link in the Federal Court of Australia Act, 1976 (Cth) were enacted in 1994. Australian case law is also useful because of the large number of reported interlocutory decisions regarding whether to adjourn a case or whether to order that it proceed remotely. In addition, Australia, like South Africa, is part of the Commonwealth and shares a common-law adversarial legal system.

In considering whether to compel parties to proceed with civil processes, the Australian courts canvassed considerations relevant to whether to proceed remotely, which essentially amounted to a discussion of the pros and cons of video-conferencing. These serve as valuable lessons and are just as relevant in South Africa and the rest of the common-law world. Unlike Australia, however, South Africa does not have a large database of reported decisions, interlocutory or otherwise, that deal with remote hearings. South African decisions are therefore not discussed in this article, although South Africa reacted similarly to the COVID-19 pandemic by shutting down congregational face-to-face court hearings during the most dangerous stages of the pandemic. Although South African courts were provided with directives that empowered them to run cases using remote technology, this was not widely taken up. An exception was in the case of appeal hearings, which were often conducted over telephone or platforms such as Zoom or Microsoft Teams.

2 BACKGROUND

Australia is a parliamentary democracy, in which powers are distributed between a national government and six states.[2] There are also three self-governing territories.[3]

At the top level of the judicial hierarchy is the Australian High Court. The Federal Court has jurisdiction in national areas of activity and hears cases brought under commonwealth law. Most cases surveyed in this article are Federal Court decisions. Each state and territory has a Supreme Court, as well as magistrates' courts and county or district courts.

The Federal Court is empowered to take evidence by video link technology in terms of section 47A (1) of the Federal Court of Australia Act 1976 (Cth). The section grants courts a broad discretion in this regard – to be exercised in the interests of justice. Certain conditions must be fulfilled before video links may be used. These are set out in section 47C and refer to the rules of the court. The sections relevant to video-link testimony were enacted in 1994. The states and territories have similar legislation in place.[4]

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2 New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

3 Australian Capital Territory, Northern Territory and Norfolk Island.

4 For example, in New South Wales there is the Evidence (Audio- and Audio-Visual link) Act, 1998.

3 APPROACH TO AUDIOVISUAL LINKS PRIOR TO COVID-19

Before the COVID-19 pandemic, there were two broad approaches to the giving of evidence by remote link in Australia – a line of cases in favour of using audio-visual technology in the taking of evidence, and a line of cases taking a more cautious approach.[5] The cases taking the first approach took the view that the onus was on the party opposing the use of video-conferencing technology to show why the technology should not be used. The cases taking the other approach took the view that the party seeking the use of the technological facilities should discharge the onus of showing why they should be used.[6] The cases all analysed the pros and cons of using

[5] This was noted in *Australian Securities and Investments Commission (ASIC) v Rich* [2004] NSWSC 467 https://jade.io/article/133378 (accessed 2021-03-22) par 17 and 18, where the court held: "It seems to me there are broadly two approaches exhibited by the observations in the cases. One line of cases, generally in favour of the use of audiovisual evidence, includes *Bayer AG v Minister for Health of the Commonwealth* (1988) 13 IPR 225 (Young J), *ICI Australia Ltd v Commissioner of Taxation* (Federal Court of Australia, Ryan J, unreported, 29 May 1992), *Henderson v SBS Realisations Ltd* (English Court of Appeal, 1992, unreported, extracted in *B v Dentists Disciplinary Tribunal*, cited below), *DPP v Alexander* (1993) 33 NSWLR 482 (Hunt CJ at CL), *Commissioner of Taxation v Grbich* (1993) 18 AAR 74 (Beaumont J), *Meehan v GPR Management Services Pty Ltd* (Federal Court of Australia, Einfeld J, unreported, 31 May 1994), *B v Dentists Disciplinary Tribunal* [1994] 1 NZLR 95 (Williams J), *Studniberg v JP Morgan Australia Ltd* [1998] NSWIRComm 483 (Schmidt J), *R v Kyu Hyuk Kim* (1998) 104 A Crim R 233 (Coldrey J), *Mewett v Commonwealth of Australia* [1998] FCA 1360 (Katz J), *McDonald v Commissioner of Taxation* (2000) ATC 4271 (Finn J), *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 (Katz J), *Versace v Monte* [2001] FCA 1454 (Tamberlin J), *K v S* (2001) 27 Fam LR 498 (Full Family Court), *Reinsurance Australia Corporation Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2001] FCA 1549 (Jacobson J), and *Sheldon & Hammond Pty Ltd v Metrokane Inc* [2002] FCA 1561 (Conti J).

Another line of cases, which takes a more cautious approach to the use of audiovisual evidence, includes *Poschung v Jones* (Supreme Court of New South Wales, Levine J, unreported, 25 October 1996, BC9606849), *Cigna Insurance Australia Ltd v CSR Ltd* (Supreme Court of New South Wales, Rolfe J, unreported, 29 November 1995), *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court of New South Wales, Giles CJ Comm D, unreported, 11 March 1997), *Lamesa Holdings BV v Commissioner of Taxation* (Federal Court of Australia, Sackville J, unreported, 30 June 1998), *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1 (Palmer J), *Asermeley-Rivera v Neffati* (Supreme Court of New South Wales, Kirby J, unreported, 12 April 2001, BC200101619), *Australian Competition & Consumer Commission v World Netsafe Pty Ltd* [2002] FCA 526 (Spender J) and *Moyette Pty Ltd v Foundation Healthcare Ltd* [2003] FCA 116 (Conti J)."

[6] The court in *Kirby v Centro Properties Ltd* [2012] FCA 60 par 4–5 described the two approaches in the following way: "The first [approach] is that given the advanced state of video link technology and also because of the convenience of the procedure and the savings in time and cost, a substantial case needs to be made out to warrant the court declining to make an order for evidence to be taken by video link: see *Reinsurance Australia Corp Ltd v HIH Casualty & General Insurance Ltd (in liq)* [*supra*] … 10–11…; *Versace v Monte supra* 16 and *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [*supra*] … 25. The other approach has been described as more cautious, and requires good reason to be shown before *leave to give* evidence by video link is granted: *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* [*supra*] … at [7]; *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australian Securities Ltd* [*supra*] … (BC9700538) at 6 …; *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* [*supra*] …; [2001] NSWSC 651 at [27]."

video technology and either concluded that the disadvantages of remote witness testimony outweighed the advantages and that it was thus not in the interests of justice to use it, or *vice versa*. In *Australian Securities and Investments Commission v Rich*,[7] Austin J held that the two conflicting approaches could be resolved by adopting two principles:

> "First, the court should strongly encourage the use of current-generation electronic aids to its work, provided they are cost-effective and their reliability has been adequately established, recognising that a technological innovation which saves time and money may be acceptable even if it delivers a product not quite as good as the traditional alternative. Secondly, there will be exceptional cases where, presented with a choice between taking evidence by electronic means or using the tried and true viva voce method, the court will decide there are good grounds for proceeding by viva voce evidence."

In *Australian Competition and Consumer Commission v StoresOnline International Inc*,[8] Edmonds J cited Austin J, saying that his observations

> "illustrate the point that the choice in every case cannot be determined solely by reference to general principles because it is the application of those principles to the facts and circumstances of the particular case which must determine the choice; in the circumstances of a particular case, a matter may point one way and in another case it may point another way. At the end of the day, the exercise of the discretion as to what is appropriate in a particular case will involve a balancing exercise as to what will best serve the administration of justice consistently with maintaining justice between the parties."

4 APPROACH DURING THE COVID-19 PANDEMIC

Once the COVID-19 pandemic entered the equation, another consideration came to the fore. Given the uncertainties concerning the duration of the limitations that made in-person trials unfeasible, or which prohibited witnesses from travelling to court for an in-person hearing, there was an interest in not delaying justice indefinitely.[9] As the court held in *Australian Securities and Investments Commission v Wilson*,[10]

> "Considerations which may have influenced an application for video evidence based on inconvenience to the witness take on a different complexion when in

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7 *Supra* par 43.

8 [2009] FCA 717 par 14 https://jade.io/article/96097 (accessed 2021-03-29). See, also, *Australian Competition and Consumer Commission v Pirovic Enterprises Pty Ltd* [2014] FCA 544 par 11 https://jade.io/article/751850 (accessed 2021-04-07), where the court held that in deciding whether to allow evidence by audio video link "the overriding consideration must, however, forever remain what is considered by the Court to be in the best interests in the administration of justice, including the need to see that justice is done as between the parties."

9 See *Capic v Ford Motor Company of Australia Limited (Adjournment)* [2020] FCA 486 par 23–25 https://jade.io/article/725605 (accessed 2021-03-20). See, also, *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd* [2020] FCA 1153 par 40–45 https://jade.io/article/759681 (accessed 2021-03-22).

10 [2020] FCA 873 par 20 https://jade.io/article/753595 (accessed 2021-03-22). See, also, *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38 par 8 https://jade.io/article/723792 (accessed 2021-03-22) and *Capic v Ford Motor Company of Australia Limited supra* par 19 and 25.

> person evidence becomes a matter of practical impossibility for an indefinite time."

Another major difference in the scenarios prior to and after the start of COVID-19 was apparent: before COVID-19, the application would usually be for the court to sit as usual and for a witness or witnesses located remotely to testify by audio-video link; with COVID-19, the necessity was for the entire trial to proceed remotely, with all the stakeholders separated from each other physically. This raised new challenges, such as how to take instructions, or how senior and junior counsel would interact (for example, during the cross-examination of a witness). Counsel and client would be separated, as would counsel and bench.

There were a number of applications to adjourn trials until in-person hearings became possible, rather than allowing them to proceed on a remote-hearing basis. Again, the two lines of thinking became prominent: some courts took the view that the interests of justice required the adjournment of the process, while others ordered the process to continue remotely.[11] All, however, emphasised that the test was what was in the interests of justice and that the question had to be decided on a case-by-case basis.[12] The cases make it clear that the mere fact that a trial is to proceed remotely is not in itself a reason to grant an adjournment.[13] The interests of justice, and the overarching purpose of civil practice and procedure, require the facilitation of the just resolution of disputes according to law – and as quickly, inexpensively and efficiently as possible.[14] Determination of what the interests of justice require is all about balancing factors that point in different directions.[15] Many of the presiding judges took into account their own and their courts' experiences with conducting processes using remote video-conferencing technology to help them

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11 See *Construction, Forestry, Maritime, Mining and Energy Union v Andrade Holdings Pty Ltd* [2021] FCCA 213 par 13 https://jade.io/article/785288 (accessed 2021-03-22).

12 See, for e.g., *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732 par 81–82 https://jade.io/article/752453 (accessed 2021-03-22), where Robb J agreed in principle that "the legal system must continue to function [despite the difficulties caused by the COVID-19 pandemic] and … parties may have to accommodate themselves to unconventional approaches to the conduct of hearings, including … audio-visual link", but held nevertheless that the unique facts before him were such that it would be unfair for him to order that the trial proceed remotely. See, also, *Tetley v Goldmate Group Pty Ltd* [2020] FCA 913 par 10 https://jade.io/article/754096 (accessed 2021-03-22), where Bromwich J declined to follow cases relied upon by the party seeking an adjournment to avoid proceeding remotely, saying "These cases ultimately turn on their individual facts, and the cases, whilst usefully stating some overarching principles, do not override the need for that individual assessment to take place".

13 *Ozemac Pty Ltd v Jackanic* [2020] VCC 790 par 6 https://jade.io/article/752117 (accessed 2021-03-22), where the court held that the cases in the burgeoning jurisprudence dealing with COVID-19 issues demonstrated this.

14 *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504 par 10 https://jade.io/article/725897 (accessed 2021-03-07); *Capic v Ford Motor Company of Australia Limited supra*; *Ozemac Pty Ltd v Jackanic supra* par 11. See, also, s 37M(1) and (3) of the Federal Court of Australia Act, 1976 (Cth).

15 *Ozemac Pty Ltd v Jackanic supra* par 11. See, also, *ASIC v Wilson supra* par 36.

balance the competing submissions and factors pointing in different directions.[16]

In *Australian Securities and Investments Commission v GetSwift Limited*,[17] the court held that the application for the adjournment of a trial on the basis of an objection to a remotely conducted trial was

> "one which was fully justified, and [which] raises matters to which it is necessary to give close attention. No litigant, particularly … in serious proceedings, should apprehend that they will be materially prejudiced by reason of the mode by which a trial is to be conducted."

These sentiments were echoed in *Capic v Ford Motor Company Australia Limited (Adjournment),*[18] and *Tetley v Goldmate Group Pty Ltd*,[19] where it was observed that what emerged from the authorities was that the decision to adjourn or proceed remotely was a balancing act – and a difficult one at that. Bromwich J said that he had found himself surprisingly torn between the two options and that it was not as clear-cut as he had thought it would be.[20]

In this article, the considerations relevant to deciding whether it is in the interests of justice to proceed remotely using audio-visual link technology is discussed in the context of the two lines of cases, and the recent approaches taken to whether to adjourn a trial, or order that it proceed remotely.

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16 For example, in the case of *Australian Securities and Investments Commission v GetSwift Limited supra* par 25, Lee J said "Central to my analysis is the accumulating experience of the Court in the use of Microsoft Teams technology to hear cases … I have now conducted a number of interlocutory hearings, and a complex defamation trial involving extensive cross examination and reference to documents. The hearings were successful … Indeed, as someone who was quite skeptical about how the trial could be conducted in current circumstances, I was pleasantly surprised. Speaking generally … there was [nothing] second rate about the experiences that I have had with Microsoft Teams technology." See, also, *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court said: "My impression of [Microsoft Teams, Zoom or Webex] has been that I am staring at the witness from about one meter away and my perception of the witnesses facial expressions is much greater than it is in court." Also see *Ozemac Pty Ltd v Jackanic supra* par 13, *Desira v Airservices Australia* [2020] FCA 818 par 36 https://jade.io/article/752475 (accessed 2021-03-07); *Universal Music Publishing Pty Ltd v Palmer* [2020] FCA 1472 par 32 https://jade.io/article/769758 (accessed 2021-03-22); *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942 par 18 https://jade.io/article/755564 (accessed 2021-03-21). See, also, *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd supra* par 49, where Stewart J commented that his impression was that counsel, even those who had initially been skeptical of cross-examining remotely, had shared his positive experience with it. He added that counsel as well as the bench had the advantage of seeing the witness up close on a screen. See, also, *Tetley v Goldmate Group Pty Ltd supra* par 16; *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 par 26 https://jade.io/article/756246 (accessed 2021-04-07). But compare *Rooney v AGL Energy Limited (No 2) supra* par 17–19; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No. 4)* [2020] FCA 614 par 22 https://jade.io/article/728480 (accessed 2021-04-07).

17 *Supra* par 9.

18 See, also, *Capic v Ford Motor Company of Australia Limited supra* par 26.

19 *Supra* par 20.

20 *Tetley v Goldmate Group Pty Ltd supra* par 15.

5 RELEVANT CONSIDERATIONS

5 1 Issues regarding whether to use video-conferencing technology

5 1 1 Importance of the evidence

There have been cases where evidence has been allowed to be taken by audio-visual technology even though the evidence was of central importance to the case.[21] On the other hand, there have been cases where this consideration was one that weighed towards disallowing such evidence to be taken by audio-visual link and towards granting an adjournment.[22] In *ASIC v Rich*,[23] the court held that there was no inconsistency in the two lines of cases. Austin J held:

> "The fact that the witness's evidence will be centrally important should not of itself persuade the court against using audiovisual facilities. But if the court can anticipate that the cross-examination of the witness will be lengthy and complex, and that the credit of the witness will be challenged, that combination of factors is likely to persuade the court against audiovisual evidence unless there is a good reason for choosing it."

5 1 2 The architecture of the physical court room

In *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (no. 3)*,[24] the court held:

> "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

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21 *McDonald v Commissioner of Taxation* (2000) FCA 577 https://jade.io/article/101659 (accessed 2021-03-25); *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd* [2000] FCA 1261 (Katz J) https://jade.io/article/102339; *R v Kyu Hyuk Kim* (1998) 104 A Crim R 233 (Coldrey J) https://jade.io/article/72577 (accessed 2021-03-25).

22 *Poschung v Jones* (Supreme Court of New South Wales, Levine J, unreported, 25 October 1996, BC 9606849); *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1 https://jade.io/article/129809 (accessed 2021-03-25).

23 *Supra*.

24 [2009] FCA 1306 par 78 https://jade.io/article/119929 (accessed 2021-03-22). See, also, the case of *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court commented on the increased lack of formality in the proceedings.

> 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 cross-examiner of that traditional forensic element in the exchange."[25]

In *Rooney v AGL Energy Limited (No. 2)*,[26] the court held as follows:

> "Moreover, there is a sense of solemnity – perhaps even intimidation – that attaches to the receipt of oral evidence from a courtroom witness box that not even the best technology can replicate. When all witnesses (or crucial witnesses) in a matter are subjected to that same stage, the truth is less easily spun, and unsuccessful parties are less inclined or less able to find fault with the process that delivered their defeat."

5 2 Issues facing lawyers running a remote case

5 2 1 Document management

Challenges with the management of documents, particularly during cross-examination on an online platform, have often been raised as an obstacle to proceeding remotely.

In *Cigna Insurance Australia Ltd v CSR Ltd*,[27] Rolfe J said:

> "Anyone familiar with cross-examination on documents, particularly large numbers of documents, will be aware that even when that happens in court there can be delays as witnesses move from volume to volume and seek to find page numbers."

He intimated that these delays would be more pronounced on a remote platform. Ultimately, however, he allowed the process to proceed by audio-visual link but on condition that the remote witnesses had hard copies of the documents and that there was someone with them to help them find the relevant pages of the documents. Austin J, in the *Rich* case,[28] agreed with this approach but identified serious practical problems with the documentary evidence if the proceedings did not proceed *viva voce*. He noted that, in the case before him, the plaintiff's documents comprised a six-volume tender bundle and twelve volumes of exhibits for their experts' report. He held:

> "One would expect, and senior counsel for the defendants confirmed, that other documents not in [the plaintiff's] tender bundle will be put before the witnesses. To achieve this in an audiovisual setting, senior counsel for the defendants would (as a practical matter) need to prepare his cross-examination sufficiently far in advance to ensure that copies of all the

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25 This quote has been referred to with approval in many cases, most recently in 2018 in *Flash Lighting Company Ltd v Australia Kungian International Energy Co Pty Ltd (no 2)* [2018] VSC 821 https://jade.io/article/634631 (accessed 2021-04-01). But in the case of *Universal Music Publishing Pty Ltd v Palmer supra* par 31, the court noted that these comments were made outside of the exceptional circumstances caused by the COVID-19 pandemic, and further, at par 32, that the current technology is superior to that used at the time the *Campaign Master* case was decided.

26 *Supra* par 18–19.

27 *Cigna Insurance Australia Ltd v CSR Ltd* (Supreme Court of New South Wales, Levine J, unreported, 29 November 1995) par 7, referred to in par 29 of *ASIC v Rich supra* par 28.

28 *ASIC v Rich supra* par 31.

> documents he wished to show to the witnesses were present in London by the time he came to do so. The defendants' documents would need to be kept safe and confidential in London before and even after their use."[29]

For this, and other reasons, the court did not order that the evidence of the witnesses located in London be taken by video link. Other courts have also taken the view that remote proceedings are not appropriate where the documents are voluminous and complex.[30] But compare this with the case of *Capic*,[31] where the court per Perram J held that it did not accept the submission that document management of large volumes would be that much more difficult in a virtual environment. He drew on his own experience of using Dropbox to exchange documents in a virtual trial he ran and went further to state that "the use of a third party operator may carry with it enhanced document management procedures".

Similarly, in *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd*,[32] Stewart J said that he was

> "not concerned about the volume of documents and cross-examination on documents. The parties may have to be a little better prepared to ensure that court books are prepared well in advance and are available in different locations with common pagination and the like, and cross-examining counsel may be constrained not to leave preparation of cross-examination until the night before the witness gives evidence as sometimes apparently occurs. That is because it may be necessary to ensure that any documents that are going to be cross-examined on are made available in the remote location in advance. File-sharing facilities such as Dropbox, Google Drive and OneDrive have made the task of 'handing up' documents or showing documents to a witness in a remote setting quite manageable."

5 2 2 Physical separation of legal teams

During periods of hard lockdown, another issue that arose was that if the process were to proceed, not only would the witness testifying remotely be separate from the rest of the stakeholders, but the stakeholders would be separated from each other: client from counsel, and members of the legal team from each other.

In *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd*,[33] one of the issues was that senior and junior counsel would not be in the same room when delivering argument. Dismissing the concern, the court held that "[w]hile it is no doubt inconvenient that counsel are not co-located, it remains

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29 *ASIC v Rich supra* par 32.

30 *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd supra*; *Australian Competition and Consumer Commission v World Netsafe Pty Ltd* [2002] FCA 526 https://jade.io/article/105449 (accessed 2021-03-25); *Moyette Pty Ltd v Foundation Healthcare Ltd* [2003] FCA 116 (Conti J) https://jade.io/article/106705 (accessed 2021-03-25).

31 See, also, *Capic v Ford Motor Company of Australia Limited supra* par 20.

32 *Supra* par 53.

33 *Supra*

possible for [them] to communicate electronically".[34] In *ASIC v GetSwift Ltd*,[35] Lee J held:

> "No doubt there will be real disadvantages in junior counsel being unable to tug senior counsel to remind him or her of some question or document that … [they] may have forgotten, but there are other ways … for such communications to take place in real-time, and in any event I am confident, through some patience and forbearance, that appropriate accommodations can be made, including for there to be short adjournments prior to the conclusion of the cross examination of any witness, if required."

In *Capic*,[36] while acknowledging the disadvantages of the legal team not being located in a single geographical place (ideally the courtroom), Perram J also held that there were ways for counsel to communicate in real time by platforms such as WhatsApp and instant messaging services. He specifically mentioned that document-sharing over such platforms was difficult, holding as follows:

> "Receiving whilst in full flight a WhatsApp message with a document attached is not the same experience as having one's gown tugged and a piece of paper thrust into one's hands … while I think this is a poor situation in which to have to run a trial I do not think it means that the trial will be unfair or unjust."

5 2 3 Taking instructions

One of the arguments raised in the *Tetley*[37] case was the difficulty in taking instructions from a client during the course of cross-examination when the client was not located physically with the legal team. These difficulties were also acknowledged in *GetSwift Ltd*[38] but the court dismissed the concerns holding that they were not "insuperable" "with the use of some imagination".

In contrast, in *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)*,[39] the court found that the difficulty in taking instructions and conferring with the legal team that would be caused by them all being confined to their homes was such that it would not be in the interests of justice to proceed remotely.

5 2 4 "Reading" the bench/chemistry

In *JKC Australia LNG Pty Ltd*,[40] an appeal hearing was due to be conducted telephonically or by video link if the parties had the means. There was an application to adjourn the hearing on, *inter alia*, the basis that senior counsel for the respondents "would be at a significant disadvantage if he could not see and 'read' the court," referring to the benefits of non-verbal communication. The court rejected the submission, saying that procedural

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34 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 16.
35 *Supra* par 29.
36 *Capic v Ford Motor Company of Australia Limited supra* par 13.
37 *Tetley v Goldmate Group Pty Ltd supra* par 10.
38 *ASIC v GetSwift Limited supra* par 34.
39 *Supra* par 32–33.
40 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra*.

fairness requires only that a party be given an adequate opportunity to properly present its case. The court held that it was its experience that

> "[t]he conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench … it is not the case that an appeal hearing by telephone is manifestly inadequate or that an appeal hearing by video link is inadequate."[41]

5 2 5 Time difference

Where a witness is located in a different time zone to that of the court and the proceedings are anticipated to be lengthy, practical problems may arise if the matter is to proceed remotely.[42] This factor was only given attention in a handful of cases where the witnesses due to testify via video link were located outside of Australia in another time zone.

In the *Rich* case, the remote link was proposed to be between Australia and London. The evidence of the two London witnesses was proposed to be heard for three hours a day between 5 pm and 8 pm Sydney time, that is 8 am to 11 am London time. The court observed as follows:

> "The rough estimate given by senior counsel for the defendants is that 5 full days will be needed for the cross-examination of the two witnesses. That translates into at least 10 audiovisual sittings. I say 'at least' because any delays inherent in the process or produced by technical difficulties (such as losing the connection) would, of course, expand the required time. Thus, for at least two weeks and in all probability more than two weeks, the court would assemble to hear audiovisual evidence in the evenings. Senior counsel for [the plaintiff] proposed that during that time, no evidence would be taken in the afternoon on Sydney, but evidence would be taken from other witnesses during the morning. Thus the court and, more particularly, the cross-examining team would be required to prepare for two cross-examinations each day, running in tandem. Although Sydney lawyers are renowned for their hard-working habits, I believe that would be a particularly arduous schedule."[43]

In *GetSwift Ltd*,[44] the time difference between the location of the witness proposed to testify remotely and the Australian court meant that the remote witness would be required to testify late at night if the Australian court was to sit during working hours. The court stated that this would not be fair for the witness but said that it would be prepared to sit outside normal court hours to accommodate that witness.

Similarly, the court said it would sit at times outside usual working times to accommodate the "time zone problem" in *Capic.*[45]

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41 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 7. Note: in the case of *Capic v Ford Motor Company of Australia Limited supra* par 19, the court also acknowledged as a problem with remote trials the reduced opportunity for chemistry to develop between cross-examiner and witness.

42 *ASIC v Rich supra* par 37.

43 *ASIC v Rich supra* par 39.

44 *ASIC v GetSwift Limited supra* par 36.

45 *Capic v Ford Motor Company of Australia Limited supra* par 15.

5 3 Issues facing the parties

5 3 1 Trial length

It is commonly accepted that conducting a process remotely takes longer than a traditional in-person hearing.[46] This is because of the possibility of technological hitches and the potential complications of navigating documents remotely, but also because of the possible delay in the transmission of sound and images from one location to another.

In *Rich*,[47] the court referred to a decision by Rolfe J, saying:

> "In the *Cigna Insurance* case [he (Rolfe J)] said (at [6]) that in his experience cross-examination is necessarily somewhat slower by video link than where a witness is present in the courtroom, and observed that there was a necessary hiatus between the asking of the question and receipt of it by the witness, and then another hiatus between the giving of the answer and reception of it by the cross-examiner. He said that where cross-examination is to take place over a substantial period of time, the use of audiovisual procedures would inordinately lengthen the cross-examination."[48]

The evidence in the *Rich* case[49] was that the technology had improved significantly since the *Cigna Insurance* case[50] and that the delay at that time (2004) was virtually imperceptible. Nevertheless, internet connections do not always function adequately, and delays caused by freezing on screen and the dropping of connections cannot be discounted. One also has to pause for longer intervals between question and answer to ensure that each party has finished speaking because of the lack of non-verbal cues signalling turn-taking (with the possible exception of facial expressions, which some judges have observed are enhanced on screen).

In *Capic*,[51] the applicant was proposing to call 50 witnesses. In *GetSwift Limited*,[52] the applicant intended calling 41 witnesses, 31 of whom would be cross-examined. In both cases, the court did not consider the size (or length) of the trial as an impediment to proceeding remotely.

A lengthier trial is of course relevant to cost, which is considered next.

5 3 2 Expense

During the time of hard lockdown in Australia, the expense of preparing for the trial remotely was also raised as a consideration.

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46 *ASIC v Wilson supra* par 3.
47 *ASIC v Rich supra*.
48 *ASIC v Rich supra* par 33.
49 *ASIC v Rich supra* par 34.
50 *Cigna Insurance Australia Ltd v CSR Ltd supra* par 7, referred to in par 33 of *ASIC v Rich supra* par 28.
51 *Capic v Ford Motor Company of Australia Limited supra* par 18.
52 *ASIC v GetSwift Limited supra* par 13.

In *Capic*,[53] the party opposing the running of the trial remotely, and seeking a postponement, raised the issue of having to consult with expert witnesses via a virtual platform in preparation for the trial – instead of liaising with them in person. The court held that counsel must understand the expert evidence fully and that conferring with the experts to achieve this level of understanding can take days and is ideally done face to face. The court accepted that conferring with the experts (as well as the other stakeholders) on a virtual platform would "[b]e slower, more tedious for all concerned and therefore more expensive" but it did not accept that this would render a remote trial unfair.

The cost of using the virtual facilities must also be considered, and likewise that a remotely conducted trial will usually run for much longer than an in-person trial. In *Capic*,[54] the court held:

> "There is no doubt … that conducting the trial in a virtual environment will prolong the hearing and thereby increase its expense."

Against that must be balanced the costs saved in transporting witnesses located away from the site of the courtroom to the court.

5 3 3 Right of parties to be present

It has also been argued that unless a party could observe the appeal hearing and communicate with counsel through his solicitors in the conventional way, thus participating in the process, a party would feel much more aggrieved in the event of an adverse outcome.[55] The court rejected this argument, although acknowledging that justice must be seen to be done. However, the court held that in the case before them there was no material prejudice to be caused by proceeding to hear the appeal submissions by telephone or video link.[56] This case was referred to with approval by the court in *GetSwift Ltd*,[57] where the court said that even if the court was satisfied that justice could be done by proceeding remotely, it was important that it also was perceived to be so done by the party opposing the remote hearing. Nevertheless, following the *Ch2M Hill Company Ltd* case,[58] the court concluded that proceeding remotely would cause no practical injustice so as to warrant granting the application for adjournment. The case was to proceed remotely.

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53 *Capic v Ford Motor Company of Australia Limited supra* par 14.
54 See also *Capic v Ford Motor Company of Australia Limited supra* par 22.
55 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 12.
56 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra* par 15.
57 *ASIC v GetSwift Limited supra* par 40.
58 *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd supra*.

5 4 Issues facing the parties and witnesses

5 4 1 Need for interpreters

In *Auken Animal Husbandry Pty Ltd*,[59] the court acknowledged that assessing demeanour when witnesses were testifying using an interpreter was made more difficult, but added that this was not made more difficult when it was also being done remotely.

The contrary view was taken by the court in *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd.*[60] The court held that assessing credibility when interpreters were used was difficult enough so that in such a case it was especially important that the trial run smoothly and not be bedeviled by "dislocation" – which was a real danger in remote proceedings. The dislocation could cause "unwarranted damage to the apparent credibility of the witnesses' evidence".[61] In addition, it was important that the interpreters and the witnesses had a "confident and functional relationship", which the court held could not be established remotely.[62] Robb J held as follows:

> "Substantial personal experience causes me to believe that, of all of the sources of practical difficulty that could arise in the hearing of a fraud claim dependent upon oral evidence and credibility findings, the physical separation of witnesses from their interpreters by the need to use an audio visual link is likely to be the most productive of inefficiency, delay and unfairness. Non-English speaking witnesses who are cross-examined through an interpreter often need the physical presence of the interpreter to create the immediate connection between witness and interpreter that is essential to the witness being able to respond to questions with an adequate level of confidence that the witness understands the questions and the cross-examiner understands the answers."[63]

In *Capic*,[64] the court held that it was clear that not every case would be suitable for remote hearing and gave the example of a remote trial not being feasible where an applicant does not speak English and is in immigration detention.

5 4 2 Illegality of witness testifying by video link in foreign proceedings

There have been a number of cases involving Chinese witnesses located in China who would, if the trial proceeded remotely, be required to testify by audio-visual link.

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59 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 56.

60 *Supra* par 60–61.

61 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 62.

62 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 60–61, 79.

63 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 79.

64 *Capic v Ford Motor Company of Australia Limited supra* par 7.

In *Motorola Solutions, Inc v Hytera Communications Corporation Ltd (Adjournment)*[65] and *Haiye Developments Pty Ltd*,[66] submissions were made to the effect that it would be a violation of Chinese sovereignty and illegal for witnesses who were Chinese citizens to give evidence to a foreign court by way of video-link technology. This was in terms of article 277 of the 2017 revised version of The Civil Procedure Law of the People's Republic of China. Neither court had sufficient information before it to decide conclusively what the content of Chinese law was on the point, but it was accepted that it was possible that the position stated was correct.[67] In the *Motorola Solutions*[68] case, it was acknowledged that even if it were not a correct statement of Chinese law, it would, as a matter of practicality, not be possible to convince the Chinese witnesses of this. In both cases, the trial dates were vacated for this and other reasons.

5 5 Issues regarding the integrity of the process

5 5 1 Technological limitations

Prior to the advent of COVID-19 in 2020, there was perhaps more emphasis on the limitations of technology as a reason to avoid proceeding remotely than has since been the case. But even in our current times of greatly improved technology, technological limitations have been cited as a reason militating against using video-link technology to proceed with a case and rather to adjourn it.

In *Capic*[69] (a ruling made in April 2021 at the height of the COVID-19 restrictions), one of the reasons given by the party seeking an adjournment of the trial was that there were likely to be technological problems making the conduct of a remote trial cumbersome and unworkable. Perram J acknowledged that technological hitches and intermittent internet connectivity were a reality, even in 2020, but held that while they were irritating and frustrating, they were not insurmountable problems. It might, for example, be necessary to pause the hearing from time to time until the connection improved to deal with technological hitches that might occur. He said that before COVID-19, witnesses might have needed to be shuffled around to accommodate difficulties such as delayed flights; so too in a remote trial, there could be an element of fluidity in the order in which witnesses testified, to accommodate temporary internet connectivity issues. He also mentioned problems such as people being frozen on the screen or dropping out of the proceedings altogether. He said that, while aggravating, such problems could be dealt with adequately as and when they arose. Where they could not be, the trial could be adjourned on that basis. He

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65 *Motorola Solutions Inc v Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 https://jade.io/article/726844 (accessed 2021-04-08).

66 *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra*.

67 *Motorola Solutions Inc v Hytera Communications Corporation Ltd supra* par 3. *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd supra* par 46–47.

68 *Motorola Solutions Inc v Hytera Communications Corporation Ltd supra* par 3.

69 *Capic v Ford Motor Company of Australia Limited supra* par 10–12.

noted his experience in a case that had to be suspended until one of the participants could gain access to a better internet facility. This was only one of the factors the court considered before ordering that the trial should proceed remotely.

Also, in *Rooney v AGL Energy Limited (No 2)*[70] (a ruling made in early July 2020), the court acknowledged that even then, technology could cause problems. In this case, while the court dates had been vacated in an earlier application in April, the spectre of technological problems together with other reasons caused the court to grant the application to vacate the court dates set down for later in July 2020. Snaden J held as follows:

> "The technology often begets delay, particularly when documents are to be supplied remotely. Although broadly reliable, it is not uncommon for connections to be momentarily of poor quality, occasionally to the point that they are unusable. All of these factors influence the user experience of a justice system from which all litigants are entitled to benefit."[71]

5 5 2 Coaching of witnesses and ensuring integrity of evidence

Surprisingly, the question of how to securely identify a remote witness and the problem of how to ensure the integrity of their evidence were not factors raised in many of the cases where there was an objection to witnesses testifying via video link. It did, however, arise in the two cases below.

In *Capic*,[72] the party objecting to the trial proceeding remotely raised the point that the witnesses testifying from home would not be supervised and thus there was a danger of another person "in the (upstairs bed) room coaching the witness or suggesting answers out of earshot". The particular case before the court was a class action about allegedly defective gearboxes. The court dismissed this concern saying that the danger of coaching or prompting was unlikely in such a case as opposed to, say, a fraud case. Added to this, the court considered that it was improbable that another person would "risk life and limb" to assist in this way given the circumstances of the COVID-19 pandemic, and that in any event any third party "assistant" would be unlikely to be able to help the witnesses testifying about their defective gearboxes in any significant way. The court held that a more serious problem for witnesses testifying from home could be that they were not tech savvy or that they lacked the infrastructure to testify remotely. The court held that rather than postpone the case on this speculative basis, it would deal with the problem if it arose "in a tangible form". It should be noted that the *Capic* case[73] was decided in circumstances of hard lockdown where there was no prospect of a third party (other than a family member) assisting the witness who had technological difficulties.

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70 *Supra* par 18.
71 *Ibid*.
72 *Capic v Ford Motor Company of Australia Limited supra* par 16.
73 *Capic v Ford Motor Company of Australia Limited supra*.

In *Auken Animal Husbandry Pty Ltd*,[74] decided in August 2020, the issue of ensuring the integrity of the evidence was also raised. The court held that experience had shown that it was not practical for a remote witness to be left alone in the relevant room in case they needed technological assistance. The judge's solution was for an independent support person (preferably a lawyer admitted in Australia) to be present to ensure the integrity of the evidence and also to help the witness with technological issues if they arose. The witnesses would have been testifying from mainland China.

5 5 3 Cross-examination of witnesses

In almost all the cases, the question of whether a cross-examiner would be able to do their job properly when the witness to be cross-examined was simply shown on a screen was raised as a very important consideration. It was argued that this was of particular concern where the case hung on the credibility of the witnesses. Closely related is the question of whether the credibility and demeanour of a witness can be evaluated properly when the witness appears by audio-visual link, instead of live in the courtroom. This aspect is dealt with separately, immediately below.

In *Desira v Airservices Australia*, the court held:

> "Credit issues are a real and significant consideration in the appropriateness of proceeding by video-link facilities. Whilst I acknowledge the difficulties attending on cross examination of witnesses by video link, the hurdle has not proved insurmountable in other cases conducted by video link by this court."[75]

There are a number of cases in which the courts found that they were perfectly able to assess demeanour over a screen as opposed to in-person. This was even so in some very early cases where the technology was not up to the standard now being used in the courts.[76] However, some cases also take a contrary stance. In the full family court of *K v S*,[77] the court accepted that there may be a "[d]iminution in the ability to detect … subtle nuances" that may be relevant to assessing credibility. In *Rich*,[78] the court held that it could:

> "[s]ee that on many occasions (depending on such matters as the nature of the evidence and the issues likely to be raised in cross-examination) it will be

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74 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 58–59.

75 *Desira v Airservices Australia supra* par 36.

76 See, for e.g., *Bayer AG v Minister for Health of the Commonwealth* (1988) 13 IPR 225 (Young J) referred to in par 24 of *ASIC v Rich supra*. See, also, *DPP v Alexander supra* referred to at par 25 of *ASIC v Rich supra*; *McDonald v Commissioner of Taxation supra*; *Tetra Pak Marketing Pty Ltd v Musashi Pty Ltd supra*.

77 *K v S* (2001) 27 Fam LR 498 (Full Family Court) par 24, referred to in par 27 of *ASIC v Rich supra*. See, also, *Cigna Insurance Australia Ltd v CSR Ltd supra*, *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Supreme Court of New South Wales, Giles CJ Comm D, unreported, 11 March 1997); *Asermeley-Rivera v Neffati* (Supreme Court of New South Wales, Kirby J, unreported, 12 April 2001, BC 200101619); *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd supra*; *Australian Competition and Consumer Commission v World Netsafe Pty Ltd supra*; *Moyette Pty Ltd v Foundation Healthcare Ltd supra*.

78 *ASIC v Rich supra* par 28.

> as easy to assess the credit of the witness in audiovisual as in *viva voce* evidence. The 'subtle nuances' of which the Full Family Court spoke will often not be there, and if they are, they will be captured by the video camera. But there will be exceptional cases where the audiovisual procedure will put the cross-examiner and the court at a real disadvantage in dealing with credit. They will include cases like the present one, where the witness's evidence is centrally important and the cross-examination is likely to be long and complex, and the issue of credit is likely to depend upon the witness's responses to questions based on documents shown to him by the cross-examiner. Where the court is given a choice between audiovisual and *viva voce* evidence in such a case, the court is likely to regard *viva voce* evidence as the safer course unless there is a good reason for preferring the audiovisual approach."

Likewise, in *Campaign Master,*[79] a 2009 decision, Buchanan J expressed concerns about the effectiveness of taking evidence from witnesses by video link. He said:

> "I share the concerns expressed by Spender J in *World Netscape*[80] and by Stone J in *Dorajay*[81] about 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 court room."[82]

In *Dorajay*,[83] the court held that in its experience the technical difficulties attendant on video-link connections

> "are considerable and markedly interfere with the giving of the evidence and, particularly, with cross-examination. They include technical problems such as difficulties with hearing, in presenting documents to the witness, in maintaining transmission over an extended period of time and those arising from time differences. More importantly, even if those difficulties can be overcome or minimised, there are the problems in maintaining a line of cross-examination and the difficulty of assessing a witness where evidence is given by video link. As a matter of justice to both parties these problems are critical. It is perhaps more workable where one is dealing with an expert witness who is generally well-prepared, has written a detailed report and has an expertise and familiarity with the subject that may not be the case with a lay witness."

In *Auken Animal Husbandry Pty Ltd*,[84] Stewart J made the point that technology had much improved since the experiences leading to the

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79 *Campaign Master (UK) Ltd v Forty-Two International Pty Ltd (no. 3) supra* par 78.

80 *World Netscape* is an erroneous reference. The case presumably intended to be referenced is *Australian Competition and Consumer Commission v World Netsafe Pty Ltd supra* https://jade.io/article/105449, where Spender J commented on the unsatisfactory features of cross-examination by video link.

81 *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2007] FCA 1502 https://jade.io/article/15342 (accessed 2021-04-01).

82 This quote has been referred to with approval in many cases, most recently in 2018 in *Flash Lighting Company Ltd v Australia Kungian International Energy Co Pty Ltd (no 2) supra*. But in the case of *Universal Music Publishing Pty Ltd v Palmer supra* par 31, the court noted that these comments were made outside of the exceptional circumstances caused by the COVID-19 pandemic, and further, at par 32, that the current technology is superior to that used at the time the *Campaign Master* case was decided. See similar comments in *Auken Animal Husbandry Pty Ltd v 3RD Solution Investment Pty Ltd supra* par 47.

83 *Dorajay Pty Ltd v Aristocrat Leisure Ltd supra* par 7.

statements of Buchanan J in *Campaign Master,*[85] and that judges and counsel have become more accustomed to conducting cross-examination by audio-video link. Especially during the pandemic times, "the learning curve has been steep and the experience intense".

In *Ascot Vale Self Storage Centre Pty Ltd v Nom de Plume Nominees Pty Ltd*,[86] the court was not satisfied that the case of *David Quince v Annabelle Quince*[87] was authority for the proposition that a trial should not proceed by video link if there were issues of credibility involved. (The *Quince* case was adjourned because the court considered that, on the facts, cross-examination of the witnesses remotely would cause unfairness to the parties).[88]

5 5 4 Assessing demeanour and credibility

In *GetSwift Ltd,*[89] decided in April 2020, Lee J held that in his experience there was no obstacle to assessing the demeanour of witnesses who were testifying remotely. He said:

> "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 by questions or documents".

He went further and said that the ability to assess demeanour was in some respects even enhanced because he was able to observe the witnesses more closely remotely than he was able to from the bench when a witness was live in his court.[90] The case was ordered to proceed remotely.

While ultimately finding that the problems identified were not sufficient to justify the adjournment sought, the court in *Capic*[91] found that the assessment of a witness's demeanour from their facial expressions was enhanced by remote viewing, but that

> "[w]hat is different – and significant – is that the video-link technology tends to reduce the chemistry which may develop between counsel and the witness. This is allied with the general sense that there has been a reduction in the formality in the proceedings. This is certainly so, and is undesirable. To these problems may be added the difficulties which may arise when dealing with objections".

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84 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 47 and par 48.

85 *Campaign Master (UK) Ltd v Forty-Two International Pty Ltd (no. 3) supra*.

86 [2020] VSC 242 par 19 https://jade.io/article/728614 (accessed 2021-04-07).

87 [2020] NSWSC 326 https://jade.io/article/723981 (accessed 2021-04-07)

88 *David Quince v Annabelle Quince supra* par 20.

89 *ASIC v GetSwift Limited supra* par 33.

90 Referred to with approval in *Ozemac Pty Ltd v Jackanic supra* par 13. Similar remarks were made in *Universal Music Publishing Pty Ltd v Palmer supra* par 32. See, also, *Capic v Ford Motor Company of Australia Limited supra* par 19, where the court said: "My impression of [Microsoft Teams, Zoom or Webex] has been that I am staring at the witness from about one metre away and my perception of the witnesses facial expressions is much greater than it is in court." Also *ASIC v GetSwift Limited supra* par 33, and *Tetley v Goldmate Group Pty Ltd supra* par 16.

91 *Capic v Ford Motor Company of Australia Limited supra* par 19.

In *Rooney v AGL Energy Limited (No 2)*,[92] Snaden J held that in his experience

> "the technology inhibits (if not prohibits) the cadence and chemistry – both as between bar and bench, and bar and witness-box – that personify well run causes. Those are traditional forensic benefits of which litigants ought not too lightly be deprived".

Regarding the reduction in formality and solemnity in remotely run processes, Stewart J in *Auken Animal Husbandry Pty Ltd*[93] observed that in his experience,

> "[a] judge is able to quickly remind the relevant participants of the solemnity and formality of the occasion and to re-establish the appropriate atmosphere".

He was not therefore concerned about this aspect.

5 6 Issues facing the administration of justice

5 6 1 Broader implications than the parties' interests

In *GetSwift Ltd*,[94] the court found that, in deciding whether to grant a request for the adjournment of the case because of an objection to it proceeding remotely, there were broader considerations to be considered than the interests of the parties to the matter. The court held that adjourning the case would mean fitting it into the listings at a later stage, which would displace other litigants who had an equal right to have their day in court. It would have a negative knock-on effect that would cause prejudice to other litigants.

In *Capic*,[95] the court held that while it was not ideal not to have an in-person trial, remote hearings had to be given proper consideration because

> "it [was] apparent that public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice"

during the time of limitations imposed on the usual conduct of business by the COVID-19 pandemic.

In *GetSwift Limited*,[96] the court also emphasised that the imperative was for the court to continue to function but stressed that fundamental to this was that the court justly discharge its duties.

In *Ozemac Pty Ltd v Jackanic*,[97] the court held that

> "in addition to the parties interests, there is also a public interest in having hearings dealt with expeditiously and the work of the court must continue."

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92 *Supra* par 18.

93 *Auken Animal Husbandry Pty Ltd v 3rd Solution Investment Pty Ltd supra* par 51.

94 *ASIC v GetSwift Limited supra* par 38.

95 *Capic v Ford Motor Company of Australia Limited supra* par 5.

96 *ASIC v GetSwift Limited supra* par 9.

97 *Supra* par 12.

The court referred to the case of *Plaintiff S111A/2018 v Minister for Home Affairs (no 2)*,[98] where Robertson J noted that:

> "[t]he pandemic is not a basis on which, in this matter … the applicants may expect a procedural standstill or procedural delay. The applicant's interests are not the only interests in the litigation. The respondents have an interest in getting the matter on for hearing and there is a similar public interest."

5 6 2 The open justice principle

An interesting point is that in none of the reported cases that the author has considered was any consideration given to the principle of transparency and open justice. Open justice is necessary to ensure the healthy, objective and fair administration of justice. It acts as a check on judicial capriciousness and serves as a powerful means to give the public confidence in the judicial process and the fairness and impartiality of the process of the administration of justice.

Unless measures are taken to ensure that the public has reasonable access to processes conducted online, virtual courts will be contrary to the open justice principle. One means of ensuring open access to the court proceedings (other than in-camera proceedings) is for the court to provide links to the virtual proceedings to the public and the media, according to available bandwidth. However, this method of ensuring public access comes with significant security concerns. Anecdotes regarding hackers and zoom bombers bedevilling proceedings abound. An alternative method that could be used is to live stream the process on a platform such as YouTube. YouTube live streaming of the process would give effect to the principle of open justice – without the risk of disturbance or impediments to the process.

5 6 3 Data privacy and security

Another important aspect that the Australian courts did not mention is that third-party software programs used for court hearings, such as Zoom or Microsoft Teams, are a security concern and are prone to hacking. Ideally, specially designed fit-for-purpose software should be developed and used. Blockchain technology should be leveraged to make the transmission of data safer and more secure.

6 CONCLUSION

A survey of the recent cases in which parties have sought an adjournment rather than proceeding remotely as the only option because of the COVID-19 pandemic reveals no hard-and-fast rules or principles or precedents dictating how a decision should be made. As the courts have emphasised repeatedly, it is a difficult balancing act of competing interests and considerations that must be weighed against each other to determine where the interests of justice lie. The interests of the parties (and fairness to them)

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98 [2020] FCA 499 par 17 https://jade.io/article/725838 (accessed 2021-04-01).

and the administration of justice must be weighed up against each other. It is not an easy task, and each case must be decided on its own facts. This means that some cases will be ordered to proceed remotely, and some will not.

Clearly,

> "[t]he cases demonstrate that the mere fact of a matter proceeding by way of a video trial is not in and of itself necessarily a compelling basis for an adjournment. A party is not entitled 'to have a face-to-face hearing'."[99]

Similarly, in the *GetSwift* case, the court observed:

> "Just because one cannot have a hearing conducted in accordance with traditional practices and procedures, does not mean that the court's judicial functions cannot be performed effectively where it is necessary to do so. As Voltaire observed one must ensure the perfect does not become the enemy of the good."[100]

This resonates with Perram J's observation in *Capic*,[101] where he said:

> "Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of trial on a party against its will. But these are not ordinary circumstances … I think we must try our best to make this trial work [remotely]. If it becomes unworkable then it can be adjourned but we must at least try."

In the end, the broad discretion that the courts have to either adjourn the trial or order it to proceed remotely must be exercised in accordance with the law and in order to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible. Most judges consider a face-to-face hearing ideal, while recognising that the circumstances of the case may require that witnesses be allowed to testify from elsewhere via video link or even that the entire trial be conducted remotely. The disadvantages of remote proceedings are however significant, and this suggests that the default position ought to be that the trial proceeds in the traditional way. However, exceptional circumstances warranting a departure from the traditional position have to be motivated for by the party seeking the remote indulgence.

It is interesting to reflect on what the position is likely to be after the COVID-19 pandemic. The combined judicial experience of the Australian courts appears to be that they have been pleasantly surprised at how effectively remote proceedings can run. Despite trepidation in the initial stages about technological glitches and the difficulties of cross-examining over a screen, experience seems to have shown that the concerns were mainly overstated and that, where problems exist, they can be overcome with flexibility and creativity. Indeed, witnesses have been testifying via video link in Australia since around 1994 when section 47A(1) of the Federal Court of Australia Act, 1976 (Cth) was enacted, empowering the Federal Court to

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99 *Ozemac Pty Ltd v Jackanic supra* par 6.

100 *ASIC v GetSwift Limited supra* par 2.

101 *Capic v Ford Motor Company of Australia Limited supra* par 25.

take evidence by video link. This was long before the COVID-19 pandemic forced entire trials to run remotely in certain cases.

In a future COVID-19-free world, it is unlikely that full trials will be run entirely remotely given the practical difficulties and given that most judges have acknowledged that such a situation was not ideal. It is hard to imagine circumstances in a future COVID-19-free world that would warrant conducting a completely remote trial. However, individual witnesses will continue to testify via video link where circumstances warrant this. The Australian cases suggest, for the reasons mentioned earlier in this article, the importance of technical and other support being made available to the witness while they testify. This will have cost implications but will help minimise problems occurring due to technological glitches and will assist witnesses who struggle with technology. In addition, the supporting third party can assist with the identity of the witness and ensure the integrity of the witness's testimony. In the author's view, video link will most likely be used where a witness is located abroad in order to save the cost and inconvenience of the witness travelling to the Australian court. This may especially be the case with foreign expert witnesses or witnesses who cannot travel.

While South Africa has not had the same judicial experience of running full trials remotely, the lessons to be learned from the Australian experience resonate strongly with South Africa. The issues associated with video-link proceedings are the same everywhere, and South Africa can learn valuable lessons from the Australian experience.

In the author's assessment, witnesses giving evidence by video link in South Africa will become more common in future. Evidence by video link has been placed in the spotlight by the COVID-19 pandemic, and litigants and witnesses are now familiar with video-conferencing. There is even a proposal to amend the Uniform Rules of Court to allow for the taking of evidence by video-conference link.

Rule 38, dealing with procuring evidence for trial, is proposed to be amended, *inter alia*, by the addition of rule 38(9), which would allow for the taking of evidence by audio-visual link. The proposed Rule 38(9) provides as follows:

> "(9)(a) A court may, on application on notice by any party and where it appears convenient or in the interests of justice, make an order for evidence to be taken through audiovisual link.
>
> (b) A court making an order in terms of paragraph (a) must give such directions which it considers appropriate for the taking and recording of such evidence.
>
> (c) An application in terms of this rule must be accompanied by a draft order setting out the terms of the order sought, including particulars of– (i) the witness who is required to adduce evidence through audiovisual link; (ii) the address of the premises from where such evidence will be given; and (iii) the address of the premises to where the evidence will be transmitted by audiovisual link.
>
> (d) For purposes of this rule 'audiovisual link' means facilities that enable both audio and visual communications between a witness and persons

in a courtroom, to be transmitted in real-time as they take place."[102]

Although rule 38(9) is only a proposal at this stage, it indicates an apparent intention to amend the rules to keep up to date with evolving technology in the court room – as endorsed by the South African High Court in previous cases.[103] This further strengthens the author's prediction that evidence by video link will become increasingly commonplace in South African litigation. The Australian experience predicts issues that may arise and how they have been balanced and weighed against one another in that context.

[102] E-Rules: Draft Amended Uniform Rules. Annexure A. https://www.justice.gov.za>rules_board>invite (accessed 2022-06-30).

[103] *Randgold Exploration Company Limited v Gold Fields Operations Limited* 2020 (3) SA 251 (GJ) par 2; *Kidd v Van Heeren* case number 27973/98 W of 3 September 2013; *Uramin (incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ); *Krivokapic v Transnet Ltd t/a Portnet* [2018] 4 All SA 251 (KZD); *Folley v Pick 'n Pay Retailers (Pty) Limited* [2017] ZAWCHC 86.