THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2019

CLAIM NO. AXAHCV 2016/0054

BETWEEN:

HISTORIC BEACON POINT ANGUILLA LTD
RONDA HODGE

Claimants

AND

CARL WEBSTER

Defendant

Appearances:

Ms. Paulette Harrigan of Harrigan Chambers of Counsel for the Claimants
Mr. Devin C. Hodge, Astaphan's Chambers of Counsel for the Defendant

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2019: February 11; 12; 13.
Issued on 19th February 2019.

Interlocutory appeal – Application for leave to appeal – Video Link Evidence – Court granting permission to a party to take evidence by video link – CPR 29.3 - Whether order granting permission outside of court's jurisdiction – Reasonable prospect of success on appeal – Stay of proceedings – CPR 62.19 – Overriding objective

JUDGMENT IN CHAMBERS

Chronology

[1] Innocent, J. (Ag.): The trial of this matter was listed for hearing on February 11th and 12th 2019. On December 21st, 2018 the Claimants filed an Notice of Application supported by Affidavit seeking an order from the court that the Claimants be granted permission to have the evidence of one of their witnesses

Kathleen Rogers given by video-link pursuant to Parts 29.3 and 38.6 (1) of the Civil Procedure Rules (the 'CPR').

[2] The grounds for making the application were that (1) the witness would be unavailable to attend the trial to give evidence because of a prior engagement overseas on the dates scheduled for trial and (2) it was necessary to ensure a fair, expeditious and economic trial of the matter.

[3] When the Application came on for hearing on February 5th, 2019 Counsel appearing for the defendant indicated that he wished to oppose the application. He was granted leave to argue his grounds for opposition. In a nutshell Mr. Hodge submitted that the evidence presented in support of the application was either deficient or insufficient to permit the court to exercise its discretion to grant the order prayed for by the claimant. Mr. Hodge premised his arguments on the same grounds as set out in the Notice of Application for leave to appeal.

[4] The court having found that the criteria for the exercise of its discretionary power was trigged proceeded to grant the order prayed for by the claimant. In ordering as I did I bore in mind the overriding objectives and in particular the requirement to deal with cases expeditiously and proportionately. I took into account the fact that the evidence intended to be given was important in resolving the issue of nuisance arising for determination at the trial in the case of both parties. I also took into consideration the apparent age of the parties and the fact that each of the parties had a vested interest in having the case heard within the shortest possible delay. In addition, I took into account the court's duty to manage cases efficiently, that is, to see to it that they are decided with the minimum of delay so that the parties are given a decision as soon as that can be done consistently with the interest of justice.

[5] In granting the application I took guidance from the CPR (UK) Part 32, in particular Practice Direction 32 and Annex 3 made thereunder. The parties were then

directed to make the appropriate arrangements with the Registrar's Office to facilitate the procedure for taking the evidence via video link.

[6] On February 8th 2019 the defendants filed a Notice of Application for Leave to Appeal the order of February 5th 2019 granting the claimant permission to take the evidence of the witness by video-link, that in the event leave is granted that the trial date be vacated pending the outcome of the appeal. The grounds for the application were substantially the same as the grounds relied in opposition to the order. It will be convenient to set them out below.

[7] On the morning of the trial I elected to hear the defendant's application for leave to appeal prior to the commencement of the trial. However, I raised the point with both Counsel that I was concerned that the present application was likely to delay the trial of the matter the subject matter of which had arisen as far back as July 2016. I intimated that the point was purely academic at this stage of the proceedings and more likely than not may result in unnecessary delay and a consummate waste of the court's time and resources. I noted that the matter was essentially ripe for trial and the posture adopted by the defendants in mounting a challenge to the video-link evidence could be dealt with at another stage of the proceedings.

[8] In the course of the various exchanges that ensued between Counsel on both sides and the bench Counsel Miss Harrigan indicated to the court that she was minded to embark upon the trial and elected not to take the evidence of the witness by video-link. She submitted that the witness is domiciled in Anguilla and would be returning to the jurisdiction in short order.

[9] Having heard the representations made by Miss Harrigan I asked Counsel for the defendant whether he was still minded to pursue his application for leave to appeal. Mr. Hodge indicated that he was still minded to pursue it. In fact he went on to say that he intended to pursue the application for leave to appeal also for the

reason that leave had been granted to the claimant to have the testimony of another witness Dr. Nelson taken by video-link.

[10] I took the opportunity at this time to inquire of Mr. Hodge whether he was seeking to advance the intended appeal as a collateral attack on the decision of the previous trial judge to permit the claimants to take the evidence of that witness by video-link. He indicated that this was hardly his intention and, on the contrary referred to that previous order merely to highlight the importance of the point he wished to raise on appeal in the context of the present trial. He indicated further that the result of the appeal will also determine the issue in relation to the video-link evidence of Dr. Nelson. The relevance of this point will become apparent later on in this decision.

[11] Not surprisingly Miss Harrigan raised the point when making her submissions that the present application in no way concerns the previous order made by Her Ladyship, the Honourable Justice Cheryl Mathurin directing that the evidence of the witness Dr. Nelson be taken by video-link. She says that this order was not challenged on appeal by the defendant. Therefore, she says the present application for all intents and purposes appears more likely than not to be a circuitous and last ditch attempt by the defendant to challenge the decision of the previous judge. She contended that in no way could the order of Justice Mathurin form any basis for the grant of leave to appeal the present decision.

[12] I agree entirely with Miss Harrigan's reasoning for the reasons that I shall advance later on in this decision.

[13] Mr. Hodge contended that whereas the testimony of both witnesses whose evidence was intended to be given by video-link was crucial in resolving substantial issues at the trial; and whereas the intended appeal raised a serious 'legal and procedural point' in relation to the grant of permission to receive evidence by video-link in the case of both witnesses, he was not minded to

withdraw his application for leave to appeal notwithstanding the claimant's indication that the witness would be produced at the trial.

[14] I sought to illicit from Counsel whether the fact that the claimant had changed his posture in relation to the witness had changed the landscape significantly to the extent that the matters raised on the intended appeal could be deemed merely academic and otiose. Counsel disagreed and submitted that for all intents and purposes the order of February 5th, 2019 still stood and it was the making of that order that was the subject of the intended appeal.

[15] In the circumstances, I proceeded to hear the application for leave to appeal. Oral submissions were made by Both Counsel.

The Submissions of Counsel

[16] First Mr. Hodge submitted that CPR 29.3 makes a distinction between giving evidence in public and giving evidence by any other means. He says that CPR 29.2 (1) (b) and CPR 29.2 (1) (a) are specific in nature in that they relate to two distinct species of evidence. Essentially he says that the court not having been provided with information as to where the evidence will be taken cannot guarantee that the evidence will be 'given in public'.

[17] Second, Counsel for the defendant argued that there was an absence of any specific rules of procedure or practice directions in this jurisdiction directing or regulating the manner in which video-link evidence is to be taken by the court. To bolster his argument he directed the court to the provisions of section 27 of the Evidence Act.

[18] Counsel submitted that the Evidence Act does not contain any provisions relating to the reception of evidence by video-link in the course of a civil trial. According to Mr. Hodge this lacuna does not mean that the court cannot look at the provisions

of section 27 of the Evidence Act which he says are tailored to protect the integrity and sanctity of the trial process.

[19] He lamented that in making the order the court did not properly exercise its discretion to the extent that the court did not employ any specific standard with respect to the procedure to be adopted when taking the evidence by video-link. In support of this submission he cited the authority of The Three Mile Inn Ltd Anors v Martin Daley (As Liquidator of the New Northumbria Hotel Ltd. [2012] EWCA Civ 970. I will turn to consider this decision later on.

[20] Distilled to its essence Mr. Hodge's submission is that the court failed to take into account certain relevant factors when deciding to allow evidence of the witness to be taken by video-link. In addition, he says that the affidavit presented by the claimant in support of the application was bereft of any cogent evidence which the court ought to have taken into consideration in determining whether to make the order. He cited a number of factors which he says were not canvassed in the claimant's affidavit evidence and which clearly points to the fact that the court not having these matters canvassed before it could not have arrived at the conclusion that it did. Therefore, the court's discretion was not properly exercised in view of this.

[21] Mr. Hodge further submitted that the evidence presented by the claimant in support of the application to hear evidence by video-link did not establish any good reason for the court to exercise its discretion to operate outside of the general rule that evidence should be given in public.

[22] Counsel for the defendant went on further to argue that the evidence contained in the affidavit presented by the claimant in support of the application did not permit the court to determine the location, venue or country from which the witness was going to testify. The evidence contained in the affidavit did not disclose the facilities that were available for giving the evidence. Therefore, he says the

application fell short of any reasonable grounds upon which the court could have applied its mind in determining whether to grant the claimant's application.

[23] In addition, he says that the evidence presented by the claimant did not put the court in a position to determine whether indeed the witness was unavailable to give the evidence in the local court.

[24] Counsel Mr. Hodge argued that in making its determination the court placed too much reliance on the overriding objective of the CPR. He says that the overriding objectives of the Rules did not grant the court any discretion in determining the application. Further that any discretion which the court has does not lie within the ambit of the overriding objective but rather within CPR 29.3 and CPR 38.6 (1).

[25] Mr. Hodge then touched on the question of the CPR Part 32 (UK) and Practice Direction No. 32 (PD32) Annex 3 which sets out the practice and procedure to be followed in civil proceedings in the United Kingdom. He submits that the court can look to PD 32 for guidance. Counsel then sought to amplify his submissions by highlighting the various parts of the Practice Direction which I will refer to later on in this decision.

[26] Lastly Mr. Hodge contended that there is no legislation in place in Anguilla regulating the taking of evidence extraterritorially. I understood Counsel to be saying that in arriving at the decision to order evidence be taken by video-link the court making the order must be satisfied that the permission of the relevant state authorities in the remote location has been obtained. I also understand Mr. Hodge to be saying that in the absence of any legislation or procedural rules conferring jurisdiction on the court to make an order for evidence to be taken outside of Anguilla the court possessed no jurisdiction to so order.

[27] Mr. Hodge developed the latter argument and formulated it in a way that I would call the 'jurisdictional point'. Essentially, Counsel's argument was that the taking of evidence extra-territorially is itself an exercise by the court of jurisdiction. They say

that the extra-territorial nature and operation of the order is an encroachment on the sovereign rights of a foreign state power.

[28] He went on further to argue that the Anguillian parliament intended a scheme by which this Court is empowered to take evidence by video link from, and only from, another place within Anguilla or from participating jurisdictions. The latter (save for jurisdictions that are prescribed) envisages only other jurisdictions where there is comity, in the sense that the other jurisdiction has enacted equivalent legislation for the facilitation of hearings conducted by video link.

[29] This construction, the defendant submits, follows from the fact that in relation to a video link from a place within Anguilla that place is deemed to be a part of the Court. The defendant also contends that such a construction is natural and logical because parliament cannot have intended that the Court conduct hearings by video link in circumstances where there is no legislative provision in the foreign jurisdiction conferring upon the judge, counsel and witnesses the protection, privileges and immunity they would usually enjoy; the Court has no power over the proceeding so far as it is conducted in the foreign jurisdiction so that: the Court would be unable to control the conduct of the proceedings by making directions relating to practice and procedure; the Court would be unable to make orders for maintaining confidentiality; the Court would be unable to administer an oath in circumstances where, if the witness were to commit perjury, he or she would be subject to prosecution and punishment; the Court would be unable to administer a sanction for contempt of court; and the Court (in the absence of enabling legislation in the foreign jurisdiction) runs the risk of infringing the sovereignty of the foreign state.

[30] Mr. Hodge submitted that based on the foregoing the defendants were entitled to the grant of leave to appeal as they had met the threshold test for the grant of the same. In support of his argument referred the court to the decision of The

Attorney General of Grenada Anors v Andy Redhead Civil Appeal No. 10 of 2007 citing the dicta of Edwards J.A. (Ag.) at paragraph [15] where she said:

> [15] Applicants seeking permission to appeal must recognise that leave to appeal will only be given where the Court considers that an appeal would have a realistic rather than a fanciful prospect of success or that there is some other compelling reason why the appeal should be heard.

[31] The defendants also argue that they are entitled to a stay of the proceedings pending the determination of the appeal for the reason that they are likely to be prejudiced in the course of the trial if the evidence is given by video-link and that they are not allowed to test the procedural point taken on appeal.

[32] Counsel Mr. Hodge relied on the principle set out in the case of Hammond Suddard Solicitors v Agricem International Holdings Limited in support of his application for a stay. He says that the overriding principle by which the court must be guided when deciding whether to grant a stay is whether there is a risk of injustice to one or both parties.

[33] Miss Harrigan appearing for the claimants argued that the order of Justice Mathurin in relation to the claimants adducing the evidence of Dr. Nelson by video link should not concern the present application for leave to appeal. In fact, she says, that that order was never appealed and therefore remains.

[34] She further argued that the defendant has sought to equate the practice and procedure with regard to video link evidence in criminal trials with that in civil trials. She submitted that there was a marked distinction between the two regimes.

[35] Counsel Miss Harrigan contended that the provisions of CPR were sufficiently flexible and were not intended to be as rigid as the defendant suggest. In support of this she relied on the practice set out in PD32 and Annex 3 made under the CPR (UK). She submitted that PD32 was of invaluable guidance to the court.

[36] Counsel for the claimants argued that the appeal had no realistic prospect of success. According to her it is unlikely that the Court of Appeal would disturb the exercise of discretion by the court below. She submitted that to do so would have to be as a result of the Court of Appeal finding that the court below was manifestly wrong in the manner in which the discretion was exercised.

[37] According to Miss Harrigan the court in exercising its discretion or power had to consider what was fair, expeditious and economical for the purpose of the proceedings and in conformity with the provisions of CPR 38.6 (1).

[38] She referred the court to the decision of Rowland and Another v Bock and Another [2002] EWCH 692 (QB); [2002] 4 AII ER 370 in support of her argument. In that case Newman J. held that:

> "No defined limit or set of circumstances should be placed upon the discretion to permit video link evidence. A conclusion to the contrary would conflict with the broad and flexible purpose of the CPR. Although a refusal to attend which would be characterized by as an abuse or contemptuous, or which sought to obtain a collateral advantage, could be envisaged as putting an application beyond the favourable exercise of the discretion; CPR 1.1 and 1.4 envisaged considerations of costs, time, inconvenience and so forth as being relevant considerations. ------ In the instant case, the master had failed to pay sufficient regard to the recognition accorded by the CPR to video link evidence, and his conclusion that it should only be ordered in cases of pressing need was too restrictive. He had also failed to pay sufficient regard art 6 of the convention and to the need to ensure that the parties were on equal footing. Whatever difference there might be between video link evidence and live evidence in court, the parties would plainly be on a more equal footing than if one party was present and cross-examined while the evidence of the other was confined to reading of a statement pursuant to a Civil Evidence Act notice. Furthermore, the master had paid too little attention to the claimant's reason for objecting to come to England; had underestimated the court's ability to make due allowances for any technological consequences on the demeanour and delivery of evidence by video link; and had failed to consider the advantage of a party being able to give live evidence."

<u>General approach to the exercise of the discretionary power</u>

[39] CPR 2.7 sets out the court's discretion and to where, when and how it deals with cases. CPR 2.7 (3) and (4) state:

(3) The court may order that any hearing be conducted in whole or in part by means of a telephone conference call, video-conference or any other form of electronic communication.

(4) The court may give directions to facilitate the conduct of a hearing by the use of any electronic or digital means of communication or storage or retrieval of information, or any other technology it considers appropriate.

I was minded to refer to the provisions of CPR 29.2 (1) which read:

29.2 (1) The general rule is that any fact which needs to be proved by evidence of witnesses is to be proved at –

(a) trial – by their oral evidence given in public;

(2) The general rule is subject to any –

(a) order of the court; and

(b) provision to the contrary contained in these Rules or elsewhere.

I also paid regard to the provisions of CPR 29.3 which read:

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

In arriving at my decision I was also guided by the provisions of CPR 1.1 (1) and (2)

1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2)Dealing justly with the case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing;
(b) saving expense;
(c) dealing with cases in ways which are proportionate to the –
(i) amount of money involved;
(ii) importance of the case;
(iii) complexity of the issues; and
(iv) financial position of each party;
(d) ensuring that it is dealt with expeditiously; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it –

(a) exercises any discretion given to it by the Rules; or

(b) interprets any rule.

[40] It is my view that what is required of the court making the order is a determination of precisely what the provisions of the CPR recited above contemplates. One of the matters that the court has to consider is the availability of the witness to testify at the trial. Therefore, it seems to me irrelevant what the precise reasons for that unavailability are. It was therefore in my view unnecessary for the claimants to even show the precise reasons making attendance impossible.

[41] I am of the considered view that based on the provisions of the CPR mentioned above that where a party shows to the satisfaction of the court that the witness is out of the jurisdiction, that the evidence proposed to be called is material, that the court has no powers to enforce attendance and the party cannot procure the attendance of the witness, then prima facie the court is bound to exercise its discretion to make the order unless the other side can establish that the witness can and will attend. It appears to me that the question which the court has to ask itself is whether the power to make an order was enlivened.

[42] Having regard to the nature of the evidence to be given by this witness it would have been unfair to both parties if the claimants were deprived of the opportunity to adduce the evidence on one hand and the defendants being deprived of the opportunity to cross-examine her on the other hand.

[43] It is also my view that the relevant provisions of the CPR should be read in a broad and general way so as to enable the court to take advantage of advances in technology.

[44] In all the circumstances of the case I hold the view that given the interest of both parties in the proceedings, justice would have been better served by granting the order.

The 'Jurisdictional' point

[45] The defendants say that the evidence intended to be taken by video link at a place outside of Anguilla in a place where the court had no jurisdiction is to be distinguished from a witness testifying outside of the courtroom at a location in Anguilla. In addition, they submit that in the absence of legislation or rules authorizing and regulating the taking of evidence by video link from a place that is neither a part of Anguilla or within the 'jurisdiction' of the court (meaning the jurisdiction of the Eastern Caribbean Supreme Court) nor a place where the court is a participating jurisdiction gives the court an extra-territorial jurisdiction. Mr. Hodge pointed out that the Evidence Act does not contain any regime similar to that contained in section 27 of the same act relating to the taking of evidence in civil proceedings by means of video link.

[46] It is trite law that a country's court acquires jurisdiction by virtue of the Constitution and the laws of that country. I think the answer to the defendant's submission lies in making a distinction between the exercise of jurisdiction and the exercise of a power conferred by statute.

[47] Much of the controversy centred on the defendant's contention that power conferred on the court by CPR 29.3 was a grant of jurisdiction and that it was invalid because without more the CPR cannot grant jurisdiction to the court that purports to exercise extraterritorial jurisdiction. Jurisdiction and power are confusing concepts. In Solomons v District Court of New South Wales (2002) 211 CLR 119 McHugh J commented on these concepts at 140-141 [43] (citations omitted):

> "The concept of power is different from the concept of jurisdiction as Toohey J pointed out in *Harris v Caladine* when he said:
>
> > 'Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred".
>
> … In particular contexts, jurisdiction and power can be indistinguishable. And as the judgment of Toohey J in *Harris* indicates, a grant of jurisdiction carries with it implied power to do all that is necessary to make the grant of jurisdiction effective. But just as the bare conferral of jurisdiction may imply powers or create substantive rights and duties, so may the bare conferral of a power give authority to decide, that is to say, give jurisdiction. …"

[48] I incline to the view that the authority conferred on the court by CPR 29.3 to permit evidence to be taken by video link is a conferral of power rather than jurisdiction as described above.

[49] The defendant submitted that the taking of evidence extra-territorially is itself an exercise by the court of jurisdiction. The vice of extra-territoriality is an encroachment on the sovereign rights of a foreign state or power. The taking of evidence extra-territorially might involve an intrusion into the legitimate affairs of the foreign power, for example an attempt to exercise a coercive power in that State. But it will not necessarily be so. The jurisdiction is that conferred by the common law or the various statutes (some of them) under which the causes of action are framed. It is in those common law principles and the various statutes that is to be found the authority to decide the range of matters that are being litigated. In the process of exercising that jurisdiction the court has incidental powers, including powers to direct how evidence is to be taken. Those powers may, as I have said, be exercised or be intended to be exercised in a way that would impugn the interests of a foreign power or may otherwise be inextricably connected with jurisdiction.

[50] But I do not read CPR 29.3 as being of that nature. The legislature may not have power to legislate in respect of all aspects of substantive (or procedural) law applicable in particular proceedings even though the proceedings may involve extraterritorial jurisdiction.

[51] The principle set out above can be contrasted with the position in the case of Valery Rogalskiy v JSC MCC Eurochem and Eurochem Trading GMBH BVICMAP2017/0007 (July 14, 2007). This interlocutory appeal arose out of an order of the Commercial Court that directed the appellant, Mr. Valery Rogalskiy, a Russian national and resident, to attend the court for cross-examination on his asset disclosure affidavit either in person or by video link at a venue to be agreed between the parties, or in default of agreement, to be fixed by the court on the application of the respondents. Being dissatisfied with the learned judge's order, Mr. Rogalskiy applied for and was granted leave to appeal and a stay of the order pending the hearing and determination of the appeal by the Court of Appeal. Mr. Rogalskiy appealed on the bases that the BVI court does not have the power to order a foreigner who has not submitted to the jurisdiction to attend the BVI court sitting in the BVI or elsewhere to be cross-examined on his asset disclosure affidavit given in compliance with an order of the court; and even if the court does have that power it exercised its discretion improperly in making the order.

[52] The Court of Appeal held, allowing the appeal, setting aside the order of the learned judge and ordering the respondents to pay the appellant's costs in this court and in the court below, that: (1) Section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act is the source for making cross-examination orders of deponents who make asset disclosure affidavits. The section also allows the court to make freezing injunctions with ancillary orders. The ancillary orders extend to and include orders that are necessary to make the injunction effective. The court's powers under this section extend to and include the power to order a defendant who has made an asset disclosure affidavit in compliance with the court's order and is within the court's territorial jurisdiction to attend to be cross-

examined on that affidavit. However, it is an exceptional power that should be rarely exercised by the court. (2) Where a foreigner has submitted to the jurisdiction the court, in exercising its wide powers under section 24, has the power to order him to attend for cross-examination on his asset disclosure affidavit. However, ordering a foreigner to attend for cross-examination on an affidavit that he gave in compliance with the court's order is an exercise of an exorbitant jurisdiction and could have extensive implications. In the case of a foreigner who is challenging the court's jurisdiction, a cross-examination order could include issues of sovereignty and comity, as well as service and submission to the jurisdiction; and may impose significant inconvenience and expense on the foreigner. The absence of authority on this issue is at the very least an indication that the settled practice and therefore wider jurisdiction of the court is not to issue a cross-examination order against a foreigner who is disputing service and challenging the court's jurisdiction. Based on the foregoing, the BVI court does not have jurisdiction in the wide sense to order Mr. Rogalskiy or any other person in his position who is disputing service and the court's jurisdiction, to attend the BVI court, whether in person or by video link, to be cross-examined on his asset disclosure affidavit and (3) Even if the court has jurisdiction to order Mr. Rogalskiy to attend for cross-examination that would be an exceptional order and an exercise of exorbitant jurisdiction. In making the cross-examination order the learned judge misdirected himself in the exercise of his discretion and erred by (a) relying in part on rule 30.1 of the CPR and not identifying an alternative basis for finding that the court had jurisdiction to make the cross-examination order; (b) giving insufficient weight to the issue of sovereignty; (c) failing to satisfy himself that there were sufficient safeguards in place regarding the use of the cross-examination information, leaving that issue to be resolved at a subsequent hearing; and (d) introducing the issue of credibility into the cross-examination process. As a result of these matters, the learned judge's decision to order a foreigner who is disputing service and the court's jurisdiction to attend the BVI court in person or by video link for cross-examination exceeded the generous

ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly wrong.

[53] In relation to the defendant's submission that to hear the evidence via video link runs contrary to the dictates of the CPR that evidence ought to be taken in public, I am of the view that adducing evidence by video link involves the same process as seeing and hearing a witness physically present in the same room as the judge, counsel, and such of the parties and the members of the public as are interested, is the conventional manner of taking evidence and trying a case. For all intents and purposes the remote location becomes part of the court room.

[54] It appears to me that, in the first instance, the regulation of court proceedings which involves the court regulating the manner and form and taking evidence is a question of power and not jurisdiction. The application of the power in the exercise of discretion is a different thing. The object of a court case is to achieve a just result. The effect on the interests of justice falls to be determined in the circumstances of the particular case. It is by taking into account all competing factors and balancing all relevant interests in the particular case that the court ensures that the exercise of the power will not prejudice unfairly the parties to the action. And nor will it imperil the system generally in the manner suggested by the defendant.

[55] The exercise of this discretionary power empowers (relevantly) the court to make an order, in relation to a person outside Anguilla "for the examination of the person on oath or affirmation at any place outside Anguilla before a judge of the court." The word "before" is important. Video link involves a hearing in which the judge and the witness (and possibly counsel) are geographically separated and the vision of and sound emanating from the witness are relayed from a remote location to the room in which the judge (and possibly counsel) is physically present. Can it be said that a hearing of this type is relevantly "before" the court? In DPP v X Batt J referred to this very question. His Honour was dealing with a case brought

in Victoria before a Victorian court but in which it was desired to take evidence by video link from a witness in Canberra. He said, at 9:

> "A question may arise as to before whom the examination is conducted where it is by closed circuit television or video link as opposed to oral examination by question and answer recorded and transcribed in, let us say, a courtroom in Canberra. There is, in my view, much to be said for the view that such an examination is conducted before the Magistrate sitting [in Victoria]. As Lord Donaldson MR said in *Henderson v SBS Realisations Ltd* (unreported, Court of Appeal; England, 13 April 1992, noted 108 LQR 561) a 'video link is, for all practical purposes, very much the same as hearing evidence in court'."

[56] In B v Dentists Disciplinary Tribunal [1994] 1 NZLR 95 at 104 Williams J expressed views to the same effect. “I should explain what I understand by the phrase "a video link is, for all practical purposes, very much the same as hearing evidence in court". It does not mean that video link is a simple substitute in all circumstances for *viva voce* evidence delivered in person in the courtroom. I think what His Lordship had in mind was that the end result is similar, namely evidence given by a witness who can be seen and heard by those in the courtroom and whose testimony occurs in "real time". In this respect it is to be distinguished from, for example, a pre-recorded video or evidence given by the production of an affidavit.”

[57] He opined further that “I am aware there are many expressions of judicial view urging caution in the use of video links. But generally speaking they relate to the manner in which the power is to be exercised rather than to the existence of the power itself. On the question of whether the hearing is relevantly "before" the court I have reached the conclusion that the transmission of sound and images by video link is no impediment”.

[58] In my view the terms of the CPR that empower the court to give directions concerning, among other things, the manner of the examination is broad enough to

encompass the taking of evidence by video link. Again, there is authority in other jurisdictions that the word "manner" is amenable to that construction.

Prospect of Success on Appeal

[59] For the reasons that I have advanced above I do not find that the defendant has reached the threshold test for the grant of leave to appeal. As ingenious and argumentative as the point raised may seem it is not sufficient for the defendant to show that he would merely has an arguable case on appeal.

Stay of Proceedings

[60] I also heard Counsel's oral submissions on the grant of a stay in the event that leave to appeal was granted. What the defendant seeks is not a stay of the order which is the subject of the appeal but rather a stay of the entire trial proceedings. As I indicated earlier the point intended to be taken on appeal has been rendered a moot point which seems purely academic in view of the claimants' undertaking to produce the witness for examination at the trial. This obviously changes the landscape of the present intended appeal in light of the future conduct of the trial.

[61] The defendant's argument that in any event the point also arises in relation to another witness namely Dr. Nelson would make proceeding to trial difficult since the same issue is likely to arise in relation to him. So that if the trial proceeded both parties are likely to suffer prejudice. They say that in the event that leave to appeal is not granted by this court and is granted by the Court of Appeal and in the event that the defendant is successful on the appeal it may more likely than not result in a waste of the court's time to proceed to trial. I do not find this to be a compelling reason to delay the trial any further by granting a stay. They say that this may result in the defendant having to mount a second appeal in the event that the case is decided in the claimants' favour. I do not see this as causing prejudice to either party as the point of law raised by the defendant relates only to the evidence of Miss Rogers and not that of Dr. Nelson. I am not minded to stay the

proceedings so that the defendant can avail himself of the opportunity to challenge the order of Justice Mathurin indirectly by virtue of the intended appeal.

Order

[61] In the circumstances, I will make the following order:

1. That the defendant's application dated February 8th, 2019 for the grant of leave to appeal the order of His Lordship, the Honourable Justice Shawn Innocent (Ag.) made on February 5th, 2019 for Kathleen Rogers to be called to give evidence by video link is hereby dismissed.

2. That the defendant is not entitled to a stay of proceedings and, in the circumstances, the trial shall continue pursuant to CPR 62.19 (b).

3. The defendant is at liberty to file an application for leave to appeal to the Court of Appeal pursuant to CPR 62.2 (1A) within seven (7) days of today's date.

4. The costs of the present application shall be costs in the cause.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar