



Court reviews witness's reluctance to travel to Hong Kong because of COVID-19

Introduction

In *Standard Chartered Bank (Hong Kong) Ltd v Nie*¹, the Court of Appeal refused the defendant (who resides outside Hong Kong) permission to appeal a trial judge's decision not to allow her to give evidence by videoconferencing facilities (VCF) at trial. Apparently, the defendant had been reluctant to travel to Hong Kong from Beijing (where she resides) to attend the trial because of concerns about the COVID-19 public health pandemic. Both the trial judge and the Court of Appeal appear to have been unimpressed by the defendant's application. Giving witness evidence by VCF during a trial in civil proceedings is not the norm (even during a pandemic). A party looking to rely on such evidence needs to act promptly to obtain the court's permission and provide good reasons for doing so supported by credible evidence.

Background

On 29 December 2020 the defendant applied to give evidence by VCF at trial – the trial was due to take place on 11 and 15 January 2021. The defendant resides in Beijing and the basis for her application was concern about the public health situation in Hong Kong as a result of the COVID-19 pandemic – Hong Kong was experiencing a fourth “wave” of the virus at the time.

At a pre-trial review in October 2020 the judge had reminded the defendant's legal representatives to make proper preparation for the defendant's attendance at trial considering the COVID-19 pandemic.

The judge dismissed the defendant's application on the ground of delay alone – he also appears to have considered that the predicament in which she found herself was a result of her own making.

1. [2021] HKCA 380, 25 March 2021.

2. [2021] HKCFI 80, at para. 3.

CONTACTS

Antony Sassi
Managing Partner, Asia
+ 852 2216 7101
antony.sassi@rpc.com.hk

Samuel Hung
Partner
+ 852 2216 7138
samuel.hung@rpc.com.hk

The judge commented that:

“... [w]hilst Hong Kong is under the cloud of a 4th wave of infection, the situation is not out of control and it remains one of the safest international cities in the world in terms of the pandemic.”²

It should be noted that the defendant was one of two defendants and her evidence was not incidental; indeed, her evidence appears to have been important.

The trial went ahead on 11 January 2021 and the defendant did not give evidence in person³. During the trial the defendant applied for permission to appeal the judge's refusal to allow her evidence by VCF and this was refused. She then applied to the Court of Appeal for permission to appeal on the ground that the judge's refusal had been clearly wrong.

The judge's decision to refuse evidence by VCF was a case management decision – the threshold for a successful appeal against such a decision is high. The issue for the Court of Appeal was whether the judge had been clearly wrong.

Permission to Appeal

Not surprisingly, the Court of Appeal appears to have been equally as dismissive of the defendant's arguments in support of her application to be allowed to give evidence by VCF. The Court of Appeal refused permission to appeal and, in the process of doing so, stressed some related points:

- the defendant's application to give evidence by VCF at trial had been made late
- the defendant should have been aware of the importance of her evidence and that it was likely to be challenged at trial
- given the quarantine restrictions in Hong Kong, the defendant should have made preparations to travel to Hong Kong much earlier and, if she did not intend to travel to Hong Kong, she should have applied much earlier to give evidence by VCF – particularly, as the trial judge had raised the matter at the pre-trial review
- the issue of whether to allow a witness to give evidence by VCF at trial is a matter for the trial judge, who is best able to determine it
- there appeared to be no material difference between the defendant's situation and that of a defendant who chose not to attend trial, and the defendant had been the "author of her own misfortune"⁴.

The Court of Appeal noted that:

"Notwithstanding the COVID-19 pandemic, as far as the situations in Hong Kong are concerned, the taking of viva voce evidence in person (both in civil and criminal trials) remains the usual norm here."⁵

The defendant's application for permission to appeal was refused.

Comment

The judgments of the lower court and the Court of Appeal are a useful review of the relevant legal principles governing the courts' discretion to allow a witness to give evidence by VCF at trial⁶.

As the Court of Appeal noted in passing, there are cases where the courts have allowed witnesses to give evidence by VCF at trial. These cases turn on their facts and are usually examples of where a witness is unable to travel to Hong Kong for good reasons beyond their control. In such cases, a party's legal representatives should ensure that the issue of a witness's evidence by VCF is drawn to the court's attention as early as possible – delay of itself can be fatal.

Since April 2020, the courts in Hong Kong have adopted an incremental approach to the adoption of remote hearings for civil proceedings and the judiciary has (to date) issued three guidance notes in this regard in April and June 2020 and January 2021⁷. These initiatives have generally been well-received.

In the meantime, the judiciary continues to consult on ways to extend opportunities for witnesses within and outside Hong Kong to give evidence by remote means and one can expect (among other things) one or more practice directions to be issued by the judiciary in this regard. However, the default position is (and is likely to remain) that the parties and their witnesses should be physically present in court for trials – this is particularly important with respect to viva voce (live verbal) evidence where the demeanour of the witness is an important factor for the court in assessing credibility.

Contact us

Please contact us if you have any queries regarding the issues raised in this article, or if you wish to consider any commercial dispute resolution matters in Hong Kong.

3. [2021] HKCFI 191 – see (for example) para. 107.

4. Supra note 1, at para. 23.

5. Supra note 1, at para. 22.

6. For example, see *Re Mahajan* [2010] 5 HKLRD 119 and Hong Kong Civil Procedure 2021 ("The White Book"), Order 38/3/1, commentary.

7. For further details, please see: "[Hong Kong courts further expand remote hearings for civil cases](#)" (20 January 2021).

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