



Hong Kong Court of Appeal hears appeal using video conferencing

14 April 2020

Introduction

On 2 April 2020 the Chief Judge of the High Court issued a Guidance Note setting out the practice for remote hearings in the Court of First Instance of the High Court (but not the District Court) using the court's existing video conferencing facilities (VCF). Hard on its heels, on 6 April 2020 the Court of Appeal conducted a hearing by VCF in *CSFK v. HWH* [2020] HKCA 207.

The Guidance Note and judgment were issued against the background of the current COVID-19 public health emergency, during which the courts and their registries have been largely closed since 29 January 2020, other than for urgent and essential court business. At the time of writing, this "general adjourned period" (GAP) is due to continue until 3 May 2020 and could be further extended or modified.

It is fair to say that stakeholders in Hong Kong's justice system have not been uncritical of the Judiciary's response to the pandemic, and uncomfortable comparisons have been made to other jurisdictions which have been more severely impacted by the pandemic than

Hong Kong, such as England & Wales, and Singapore, where hearings have continued using technology.

The Guidance Note

The Guidance Note is the first phase of the Hong Kong Judiciary's adoption of IT initiatives to address the growing backlog of hearings during the GAP. It represents an incremental approach to change, and further guidance can be expected. Arguably, in fact, the Chief Judge and Court of Appeal are playing catch up: a judge of the Court of First Instance has already held that procedural hearings can take place by telephone without the physical presence of the parties or their legal representatives (*Cyberworks Audio Video Technology Ltd (in compulsory liquidation)*) [2020] HKCFI 347, 28 February 2020).

The Guidance Note acknowledges the courts' ability to dispose of some court applications on papers alone, without oral submissions. There are, however, still many cases where the courts benefit from oral submissions and, importantly, where VCF hearings will be fairer and more transparent.

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CSFK v HWH

This appeal took place in a family and ancillary relief proceeding. The hearing was scheduled to take place on 6 April 2020, which fell within the GAP. The Court of Appeal therefore proposed different options as to how the case might proceed and the parties agreed to conduct the hearing using VCF.

In its judgment the Court of Appeal set out a number of observations relevant to remote hearings by VCF. Being a judgment of the Court of Appeal, it offers authoritative guidance going forward. These observations include:

- under existing statutory provisions and court rules there is no restriction on the holding of remote court hearings
- provided the judges sit in the High Court there is nothing to restrict the manner in which the parties' submissions and evidence may be received
- the dual requirements of fairness and openness must be satisfied
- fairness being an important constitutional right, the overriding aim of the courts in exercising their powers is to secure a just resolution of the dispute
- judges are in charge of their own court, subject to certain constitutional guarantees, and this applies to all hearings, not just trials in which the taking of witness evidence by VCF is already common practice
- the physical presence of the parties or their legal representatives in a civil courtroom is not indispensable: remote court proceedings can satisfy the need for fairness provided the parties have adequate opportunity to participate and to be heard

- VCF hearings allow the parties through their legal representatives (for example, Solicitor Advocates and Barristers) to address the court effectively
- the courts' audio-recording mechanism (to which the VCF can be linked) allows an accurate and official record to be kept. The requirement of open justice is therefore satisfied by VCF hearings, subject to space constraints in the courtroom and the need for appropriate physical distancing during the pandemic
- the parties and their legal representatives participating in a remote hearing conducted by VCF are subject to the usual rules of procedure and professional conduct.

Comment

The appeal was successfully dealt with by means of a remote VCF hearing. As the Judiciary's 8 April announcement suggests, more VCF hearings are likely to follow. These are expected to include a range of different cases that do not turn on live witness evidence and/or where the oral legal submissions are of limited duration.

The Court of Appeal's judgment is important because it confirms the legal basis for allowing hearings to be conducted by VCF. Together with the Guidance Note and the judgment in *Cyberworks*, it indicates a willingness on the part of the Judiciary to adopt fresh thinking to cope with difficult and unusual circumstances.

These developments do not resolve all the issues, however. For instance, the requirement that appeal judges, not all of whom are young, sit together in a court room is far from ideal in the present

circumstances. There are also concerns that the Judiciary's existing VCF facilities are insufficient to make serious inroads into the backlog in the near future. In addition, the position with respect to cases being heard in the District Court, many of which are significant, remains unclear.

As mentioned, however, the approach is incremental and further innovations can hopefully be expected as the Judiciary continues to adapt to changing times.

Contact Us

Please contact us if you have any queries regarding the above, or if you wish to consider any commercial disputes matters and, in particular, the current status of the GAP.

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