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Courts' discretion to hold virtual hearings

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Facts

In *SS Precast Sdn Bhd v Serba Dinamik Group Bhd*, (1) the plaintiff obtained a judgment in default of defence against the first to sixth defendants on 28 March 2020, which was during the enforcement of the Movement Control Order (MCO) in Malaysia. The defendants then filed applications to set aside the judgment in default, together with a certificate of urgency.

The plaintiff subsequently brought an *ex parte* application to freeze the first defendant's bank account and one of the fifth defendant's bank accounts.

The judge ordered the plaintiff's and defendants' applications to be heard by way of a Skype videoconference due to the ongoing COVID-19 pandemic.

During the videoconference on 17 April 2020, the judge gave directions in respect of both applications and fixed 29 May 2020 as the date on which the defendants' applications would be decided. The defendants' solicitors orally applied for a stay of execution of the judgment in default until 29 May 2020, to which the plaintiff's solicitors objected.

Due to the nature of the applications, the judge directed that the first to sixth defendants' applications be dealt with and disposed of before the hearing of the plaintiff's application to maintain justice in the case.

On the court's enquiry, the first to sixth defendants' solicitors informed the court that their clients had agreed to deposit RM500,000 in an interest-bearing bank account in the plaintiff's solicitor's sole name. Although the plaintiff's solicitors subsequently objected, arguing that the sum was too low, the judge granted an *ad interim* stay of execution of the judgment in default, on the condition proposed by the defendants' solicitors.

The plaintiff was subsequently dissatisfied with the videoconference and the *ad interim* stay order. In expressing its dissatisfaction, the plaintiff's senior manager lodged a police report on the plaintiff's behalf and sent a letter to the plaintiff's solicitors. Both the letter and police report contained several allegations of fraud and/or misconduct on the part of the first to sixth defendants, their solicitors and the court.

Challenge to videoconference

Pursuant to Order 5, Rule 6(2) of the Rules of Court 2012, a company can carry on legal proceedings only through its solicitors. As such, the plaintiff had consented to the videoconference through its solicitors because, among other things:

- the plaintiff's solicitors had sent its email address and could have the Skype link sent to them; and
- at the beginning of the videoconference, the high court judge had enquired as to the parties' consent to the videoconference, to which the plaintiff's solicitors had answered in the affirmative.

As such, the court had been entitled to proceed with the videoconference.

Unaffirmed affidavits were also filed in support of the respective applications. The judge exercised his discretion under Order 41, Rule 9(2) of the Rules of Court in granting leave to allow the parties to use these unaffirmed affidavits in light of the MCO (at which time affidavits could not be affirmed by a

commissioner for oaths) with the express undertaking that affirmed versions of the affidavits would be filed once the MCO was lifted.

The plaintiff's solicitors did not object to the videoconference itself or to the use of unaffirmed affidavits.

Therefore, the plaintiff was estopped from denying the validity of the videoconference and the reliance by the first to sixth defendants on the unaffirmed affidavits.

Legitimacy of videoconference

Nevertheless, the judge then discussed the hypothetical situation in which the plaintiff's solicitors may have been deemed to have objected to the videoconference.

The judge held that, notwithstanding the plaintiff's objection (if any), the court has discretion under Order 32, Rules 10 and 11 of the Rules of Court to hold a videoconference in the "overriding interest of justice". Further, the judge held that this was in accordance with Articles 4 and 5 of the Constitution.

As such, even if the plaintiff had objected, the judge held that he still would have exercised his discretion to hold the videoconference as it would have been in the interest of justice to do so.

Moreover, the judge said that if he were to rule that the videoconference could not have been held because one party had objected and the other had not, this would constitute an act of great injustice against the consenting party, contrary to Article 5(1) of the Constitution.

Comment

In comparison to the approach adopted by the courts in United Kingdom⁽²⁾ and Australia,⁽³⁾ the approach of the high court judge in the present case is largely similar. These cases demonstrate the courts' inclination towards virtual hearings to allow the functions of the courts continue, despite the technological limitations and other restrictions. This inclination may further be strengthened in light of the rapid modernisation of application processes (eg, via Skype or Zoom), which has been welcomed by the courts in the name of expediency and efficiency to better serve the justice of each case. From these decisions, even where one party may object, the court has the jurisdiction to direct that a case be dealt with by way of a videoconference. Of course, the interest of justice is of paramount importance.

For further information on this topic please contact Foo Joon Liang or Carissa How at Gan Partnership by telephone (+603 7931 7060) or email (joonliang@ganlaw.my or carissa@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) *SS Precast Sdn Bhd v Serba Dinamik Group Bhd* [2020] MLJU 400.

(2) In *Re One Blackfriars Ltd (in liquidation) Hyde and another (joint liquidators of One Blackfriars Ltd) v Nygate (in his capacity as representatives of the estate of James Joseph Bannon) and another* [2020] EWHC 845 (Ch), the high court judge decided in favour of proceeding with a virtual hearing of the trial during the COVID-19 pandemic lockdown despite an application from one of the parties to adjourn the trial because of various difficulties arising from the lockdown.

(3) In *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [2020] FCA 486, Justice Perram recognised that a mode of trial conducted over virtual platforms could be deployed to ensure the continuance of the administration of justice in so far as the courts are concerned. However, he did recognise that a trial conducted virtually may not be feasible for certain cases.