

Insights

HK COURT OF APPEAL CONFIRMS THE EXCEPTIONAL NATURE OF THE TAKING OF EVIDENCE BY WAY OF VIDEO CONFERENCING FACILITIES

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Introduction

Amidst the COVID-19 pandemic, various travel restrictions and quarantine requirements remain in place. As the Hong Kong Judiciary recognises in the [Guidance Note for Remote Hearings for Civil Business in the Civil Courts \(Phase 3: Wider Video-Conferencing Facilities and Telephone\)](#), the public health situation “*may impact the ability of witnesses and other participants to travel to and appear in the Hong Kong courts*”.

There reportedly has been a surge of interlocutory applications for witness to give evidence by way of video conferencing facilities.

However, it is important to continue to bear in mind that the giving of evidence via video conferencing facilities is and remains an exceptional practice in Hong Kong courts. The applicable legal principles of this kind of application are illustrated by the recent Hong Kong Court of Appeal case: [Standard Chartered Bank \(Hong Kong\) Ltd v Lau Lai Wendy and Nei Hai Yan Annie](#) [2021] HKCA 380.

Brief facts

The Plaintiff, a well-known bank in Hong Kong, claimed to have suffered from theft by the 1st Defendant, its former employee. The majority of the stolen funds had ended up in the bank accounts of the 2nd Defendant, the Plaintiff’s customer. The 2nd Defendant argued that the money transferred to her account represented interest paid at the rates of 20% and 40% per annum from the Plaintiff.

The 2nd Defendant resided in Beijing. On 7 October 2020, the trial judge reminded the 2nd Defendant to make timely arrangements to come to Hong Kong to attend the trial.

On 29 December 2020, the 2nd Defendant applied to the trial judge for taking evidence by way of video conferencing facilities at the trial, which was due to commence on 11 and 15 January 2021.

On 5 January 2021, the trial judge rejected the application.

The trial went ahead on 11 and 15 January 2021. The 2nd Defendant did not give evidence at the trial. The judgment was handed down on 1 February 2021.

On 13 January 2021, after the trial had commenced, the 2nd Defendant applied to the trial judge for leave to appeal against the dismissal of her application for taking evidence by way of video conferencing facilities at the trial. The trial judge refused to grant leave. Subsequently, the 2nd Defendant applied to the Court of Appeal for leave to appeal. The Court of Appeal rejected the leave application, and said that they were of the "*clear and firm view*" that the 2nd Defendant's appeal was "*totally without merit*".

Legal principles

The principles pertaining to an application for giving evidence by video conferencing facilities were summarised in *Tsang Woon Ming v Lai Ka Lim & Ors* [2020] HKCFI 891 as follows:

1. The giving of evidence by video conferencing facilities is an exception.
2. The starting point is that proceedings are conducted in court. This is more important when it comes to a trial.
3. Sound reason is required to justify a departure from the starting point.
4. The solemnity of court proceedings and its atmosphere is highly important in the taking of evidence.
5. The court may be more disposed to exercise its discretion to allow evidence by video conferencing facilities in respect of technical or purely factual evidence which involves no serious issue on credibility or relatively unimportant evidence.
6. Where the credibility of the witness is seriously contested, it is important for the witness to be examined under the solemn atmosphere of the court.
7. Costs and convenience may be important considerations which the court will have to weigh in the determination of the application.
8. Ultimately, it is a matter of judgment of the court choosing the course best calculated to achieve a just result by taking into account all the material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, the Underlying Objectives, any delay to the proceedings and practical considerations like the availability of the facilities (see Practice Direction 29).

Extremely late application

The Court criticised the lateness of the application made by the 2nd Defendant. Notwithstanding the reminder given in the pre-trial review (which was held more than three months prior to the trial) to make proper and timely preparations to come to Hong Kong in light of the quarantine requirements, the 2nd Defendant took no step to make the necessary travel arrangement until the issue of her application (just 13 days prior to the trial).

To try to account for the delay in making her application, the 2nd Defendant said she had been observing the pandemic situation in Hong Kong, and she intended to come to Hong Kong to give evidence if the situation improved. However, due to the persistence of the pandemic, the 2nd Defendant decided that it would be a serious threat to her health if she had to come to Hong Kong.

The Court declined to accept the 2nd Defendant's alleged health concern as a genuine reason not to testify in person at the trial and criticised her wait-and-see approach. The Court stressed the importance of an early application. On the one hand, if the 2nd Defendant did have a serious intention of coming to Hong Kong to give evidence (as she claimed), she should have made the application much earlier so that if the application failed, she still could have time to make arrangements to come to Hong Kong. On the other hand, if she did not intend to come to Hong Kong, she should have made the application much earlier in light of the judge's reminder at the pre-trial review.

Controversial nature of the 2nd Defendant's evidence

The Court found that the 2nd Defendant, as one of the two defendants in the trial, was fully aware of the significance of her testimony, the highly controversial nature of her evidence and the likelihood of serious challenge to her credibility by the Plaintiff.

The Court expressed the view that there was no basis for the 2nd Defendant to assume that her application readily would be acceded to. Instead, the 2nd Defendant should have been well-prepared for the likely dismissal of her application. The Court described the 2nd Defendant as "*the author of her own misfortune*" and said that the 2nd Defendant could not justifiably complain that the case was adjudicated without the benefit of her evidence.

A case management decision

The Court classified the decision on the refusal to take the evidence of a highly controversial witness by video conferencing facilities as a case management decision.

The threshold for disturbing a case management decision made by a trial judge is very high. The Court of Appeal only would intervene if the decision was wrong in principle or otherwise clearly wrong.

The 2nd Defendant referred to overseas practice in receiving video-linked evidence. The Court expressed the view that, how other judges in Hong Kong or overseas had exercised their power in

light of the facts and circumstances of different cases were of no importance or relevance to a case management decision.

In this case, the Court of Appeal held that there was no reasonable prospect for the 2nd Defendant to succeed in meeting the high threshold to disturb the case management decision.

Key takeaway

At the end of the judgment, the Court expressed the view that “[n]otwithstanding the COVID-19 pandemic, so 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”. Intended applicants for the taking of evidence by way of video conferencing facilities are reminded that strong and sound grounds must be provided for the court to deviate from the default position. More importantly, such applications must be made as early as possible.

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