

IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO.: 109 OF 2018

BETWEEN: **RELCORP (FIJI) LIMITED** a limited liability company duly incorporated under the laws of Fiji and having its registered office at Level 8, BSP Life, 3 Scott Street, Suva, Fiji

1ST PLAINTIFF

AND: **NAISOSO PROPERTY SALES (FIJI) PTE LIMITED** a limited liability company duly incorporated under the laws of Fiji and having its registered office at Level 8, BSP Life, 3 Scott Street, Suva in Fiji.

2ND PLAINTIFF

AND: **NAISOSO RESIDENTIAL MANAGEMENT LIMITED** a limited liability company duly incorporated under the laws of Fiji and having its registered office at Aliz Pacific, Level 8, Dominion House, Thomson Street, Suva in Fiji.

DEFENDANT

Appearances : **Mr. Devanesh Sharma with (Ms) Gul Fatima for the plaintiffs**
(Ms) Mary Muir for the defendant.

Hearing : **Tuesday, 18th August 2020 at 11.30a.m**
Decision : **Friday, 02nd October 2020 at 9.00a.m.**

DECISION

(A) INTRODUCTION

- (01) This is an application filed by the defendant seeking leave for the three directors of the defendant's and their witness residing in Australia to give evidence at the trial of this matter by video link, skype video connection or zoom video connection due to restrictions on overseas travel due to COVID 19 pandemic.

- (02) The application is made by summons filed pursuant to Order 32, rule (1) and Order 38 of the High Court Rules 1988 and the inherent jurisdiction of the court.
- (03) The applications is contested by the plaintiffs

(B) THE AFFIDAVITS FILED

- (04) (*) The affidavit of (Ms) Ana Tuiwawa, the legal practitioner of Siwatibau & Sloan, Solicitors for the defendant, **in support**, sworn on 12.05.2020.
- (*) The affidavit of Mr. Robert Edward Lowres, the Managing Director of the plaintiffs, **in response**, sworn on 21.05.2020
- (*) The affidavit of (Ms) Nyssa Berryman, the Director of the defendant, **in reply**, sworn on 27.05.2020.

(C) The preliminary objection by the plaintiffs to the affidavit in support sworn by (Ms) Ana Tuiwawa

- (05) Counsel for the plaintiffs say (in the forefront of his argument) that the affidavit should not be admitted in evidence by the court because it has been deposed by a legal counsel on a contentious application.
- (06) Let me turn to (Ms) Tuiwawa's affidavit in support of the defendant's application. (Ms) Tuiwawa deposed:
- (1) *I am employed as a legal practitioner by Siwatibau & Sloan, solicitors for the Defendant.*
 - (2) *I am authorized by the Defendant to make this affidavit on its behalf. A copy of the authority is annexed and marked "AT 1".*
 - (3) *I am deposing this affidavit in support of the Defendant's Inter Parte Summons for leave for the Defendant's witnesses located overseas to appear at trial by video link, Skype or Zoom connection.*
 - (4) *Some of the matters deposed herein are within my personal knowledge, others have been obtained from records maintained in the relevant files at Siwatibau & Sloan and others are stated on information and belief with the source and grounds specified.*
 - (5) *This matter is currently scheduled for trial to commence on the 25th day of May, 2020 and to continue for eight (8) consecutive court days, until 3rd*

June, 2020. I am informed by Ms. Mary Muir, the solicitor having conduct of the matter, and I verily believe, that the dates for Trial of this action were set by this Honourable Court on 4th October, 2019.

- (6) *By Legal Notice 8 of 2020 dated the 29th day of January, 2020, Novel coronavirus (2019-nCoV) was declared to be an infectious disease pursuant to the Public Health Act. Annexed hereto and marked with the letters "AT2" is a copy of Legal Notice 8 of 2020.*
 - (7) *Various travel restrictions, quarantine requirements and curfews, including quarantine requirements for travelers arriving in Fiji, have since been imposed in Fiji to the presence of COVID-19, and I humbly request this Honourable Court to take judicial notice of the same.*
 - (8) *Currently overseas travel from Australia is not allowed except in special circumstances. Annexed hereto and marked with the letters "AT3" is a copy of the Australian Government Department of Health Coronavirus (COVID-19) advice for travelers, which states "There is a ban on all overseas travel, with few exceptions."*
 - (9) *The Defendant has the following witnesses currently residing and/or located in Australia who are unable to attend the trial in person due to the said restrictions on overseas travel:*
 - (a) *Dennis Small, director*
 - (b) *Regan Berryman, director*
 - (c) *Nyssa Berryman, director*
 - (d) *Steve Dawson, broker*
 - (10) *The Defendant's solicitors have requested the consent of the Plaintiffs, but the Plaintiffs are not consenting. Annexed hereto and marked with the letters "AT 4" is a copy of the email correspondence from Mr Devanesh Sharma dated 4th May, 2020.*
 - (11) *In these singular circumstances, the Defendant respectfully requests leave to have its witnesses located overseas give evidence by video link or Skype or Zoom connection.*
- (07) As counsel for the defendant correctly submits, the matters and annexures deposed to by (Ms) Tuiwawa, mainly involve various COVID-19 notices, the presence of the defendant's directors in Australia and e-mail correspondences between the Solicitors. These matters are not disputed by the plaintiffs and are therefore non-contentious matters and accordingly her affidavit can be regarded for the purpose of the exercise of the court's discretion.
- (08) Next, on the hearing of the preliminary objection, the plaintiffs' Solicitors made an

attempt to challenge annexure marked AT-1 on the ground that a board resolution was not exhibited to show that the board has passed a resolution authorizing (Ms) Tuiwawa to swear on behalf of the defendant.

This objection had not been raised earlier than the hearing in this court. This is most unsatisfactory.

- (09) Be that as it may, in my view, it is not necessary to exhibit a copy of the board resolution.
- (10) I take into account annexure marked AT-1. Annexure AT-1 is in these terms.

May 2020

Messrs. Siwatibau and Sloan
8 Holland Street
Suva
Fiji Islands.
Attention: Ms. Mary Muir

Dear Madam,

Re: Relcorp (Fiji) Limited and Anor v Naisoso Residential Management Limited, Lautoka High Court Civil Action No. 109 of 2018

We are directors of the Defendant and are authorized by the Defendant and its Board of Directors to make this authority letter in the above action.

We authorize Ms. Ana Tuiwawa, Solicitor at Messrs. Siwatibau and Sloan to make an Affidavit on behalf of the Defendant in support of the Defendant's application for witnesses to appear by skype and any other applications required in connection with the above matter and the pending trial of the same.

Yours faithfully,

(sgd).....
Regan Berryman, Director
Naisoso Residential Management Limited

(sgd).....
Nyssa Berryman, Director
Naisoso Residential Management Limited

- (11) Upon reading AT-1, I am satisfied that there is ostensible authority to prove that (Ms) Tuiwawa was duly authorized by the board of directors to swear on behalf of the defendant.

It was also submitted by counsel for the plaintiffs' that annexure AT -1 does not contain the common seal and there is also no letter head.

Clearly, I do not consider that as a jurisdictional impediment to the application before me. This court would not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with the formalities. A further point was put forward. The plaintiffs submitted that no provisions in the High Court Rules empowered the taking of video evidence. I must say that the courts inherent power to control its procedure is the source of power to take video evidence.

The preliminary objection must be dismissed.

(D) CONSIDERATION AND THE DETERMINATION

- (12) I will now deal with the application. At the time the inter parte summons was filed and issued, this matter was listed for trial for eight (8) days, commencing on 25th May, 2020, the proceedings having been commenced on 25th May, 2018.

On 22-05-2020, the trial dates of 25-05-2020 to 03-06-2020 were vacated and re-fixed for 23rd to 27th November, 2020.

- (13) The general rule under the High Court Rules 1988 is that a party must be present personally at the trial of a matter concerning him or her. This is implied in Order 35 and Order 38 of the High Court Rules.

ORDER 35
PROCEEDINGS AT TRIAL
Failure to appear by both parties or one of them (O.35, r.1)

1. (1) *If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the direction of a Judge.*

- (2) *If, when the trial of an action is called on, one party does not appear; the judge may proceed with the trial of the action or any counterclaim in the absence of that party.*

ORDER 38
EVIDENCE
1: GENERAL RULES
General rule: witnesses to be examined orally (O.38, r.1)

1. *Subject to the provisions of these Rules and of the Evidence Act and any other enactment relating to evidence, any fact required to be proved at the*

trial of any action begun by writ by the evidence of witnesses shall be provided by the examination of the witnesses orally and in open court.

Having said that, a party to an action who is unable to attend trial and who seeks the leave of the Court to allow him or her to give evidence from a remote location, must depose in an affidavit, reasons strong enough to compel the court to exercise its discretion accordingly.

The court has power to permit a departure from the usual practice and to permit testimony to be given on the platform of video link, Skype or zoom. The exercise of the power is in the court's discretion. At the end of the day, the exercise of the discretion as to what is appropriate in a particular case will involve a balancing exercise as to what will best serve the administration of justice consistently with maintaining justice between the parties.

- (14) I understand from the affidavit of (Ms) Ana Tuiwawa, the legal practitioner of Solicitors for the defendant, that the defendant's directors are currently in Australia and unable to travel to Fiji for the trial because both Australia and Fiji's borders are closed to international travelers except for repatriation and/or compassionate exemption.

I take into account the risk posed to the defendant's witnesses by travelling to Fiji for the purpose of trial. There are two aspects to this risk; that of spreading the virus and that of contracting the virus.

In the current circumstances, it would be wholly unrealistic to expect the defendant's directors and the witnesses to travel to Fiji for the purpose of the trial. It would be impossible for them to travel to Fiji in order to participate in the proceedings without potentially endangering their health (risk of contracting the virus) and in any event, under the current quarantine arrangements, without requiring them to spend a period of time in self-isolation and quarantine.

The plaintiffs and the defendant are entitled to a fair trial which includes, necessarily fair process and procedures. Just because one cannot have a hearing conducted in accordance with traditional practices and procedures does not mean that the courts judicial function cannot be performed effectively where it is necessary to do so. The public institutions such as the court must do all they can do to facilitate the continuation of the economy and essential services of government including the administration of Justice.

- (15) The interests of justice are not confined to the interests of one party. The claimed health risk to the defendant's witnesses and the claimed inconvenience of requiring the defendant's witnesses to attend for examination and cross-examination in person cannot be held against the plaintiffs unless and until the defendant passes a respectable threshold which gives the court reason to think that, in any attempt to balance the interests of the parties, the plaintiffs' interests have been adequately, and reasonably, accommodated in all the circumstances.

The crucial question for the court is whether the interest of justice requires the use of audio-video link, skype or zoom to receive oral evidence from overseas witnesses and present themselves for cross-examination through the same medium.

(Ms.) Muir, counsel for the defendant submits that the technology is such that the trial can realistically proceed. I confess that I am not so comfortable and optimistic because, despite all the technology advances, it has significant limitations.

The court must continue to do its job but fundamental to the discharge of the role, the court must ensure that cases are determined justly. **No litigant, particularly a litigant involved in court proceedings, should apprehend that they will be materially prejudiced by reason of the mode by which a trial be conducted.**

The overarching purpose of the civil practice and procedure provisions, of course, is to facilitate the just resolution of disputes that is according to law and as quickly, inexpensively and efficiently as possible.

Needless to say, **if I am satisfied that if the procedure to be adopted is causing unfairness to a party or parties, then that is the point that it does become a second rate hearing and I would not accede to the application.**

(16) I will now refer to the reasons for the defendant's application that the defendant's Directors and another potential witness (all in Australia) be permitted to present themselves for examination and cross-examination by video-link or zoom in Australia.

(17) Counsel for the defendant submits; Reference is made to written submissions filed on 18-08-2020.

(*) *As shown in Annexure "AT 2" to the Affidavit in Support, Fiji declared the novel coronavirus (2019- nCoV) to be an infectious disease on 29 January 2020.*

(*) *The World Health Organization declared a global COVID-19 pandemic on or about 11 March 2019. This has been widely covered in the news media and social media. A copy of the WHO article is attached to these submissions as tab 1.*

(*) *As referred in the Defendant's affidavit in Support and Affidavit in Reply, the Defendant's directors are currently in Australia, and unable to travel to Fiji for this trial due to both Australia's and Fiji's borders close to international travelers except for repatriation and/or compassionate exemption.*

(*) *Further any international travelers are currently subjected to lengthy quarantine measures. Even if an exemption to travel was granted, attending a trial in Fiji from Australia at this time would require at least 14 days quarantine on arrival from Australia and another 14 days quarantine upon return to Australia.*

- (*) *Currently the only official guidance available to this Court is the letter issued by the Acting Chief Justice on 20 April titled "Court Operations – COVID-19 (annexure "NB-3" to the Affidavit in Reply).*
 - (*) *Paragraph 6 of that letter instructs parties to make joint applications to have matters dealt with or heard via written submissions or skype, and rests the discretion to deal with such applications with the judicial officer.*
 - (*) *That letter also directs that inmates and detainees be dealt with via skype if possible, and grants the judicial officers the discretion as to whether their presence is required in court.*
 - (*) *The Plaintiffs having refused to consent to the Defendant's request for the Defendant's witness to appear by AVL, it is for this Court to exercise its discretion as to whether to permit overseas witness to appear via AVL.*
 - (*) *We remind that it currently appears very unlikely that Fiji's borders will open to travel from Australia without quarantine by November, when this matter is now scheduled for trial, due to increased COVID-19 infections in Australia and New Zealand.*
 - (*) *If the Defendant's directors and other witnesses are not allowed to participate remotely, then the trial would have to be delayed indefinitely until international travel without the imposition of quarantines is restored between Australia and Fiji.*
 - (*) *In the absence of any local legislation or court rules addressing these issues caused by the current pandemic, public health measures and travel restrictions, this Court should look to and take into consideration the measures employed by neighbouring Commonwealth jurisdictions to deal with the effect of COVID-19 restrictions on trials and hearings.*
- (18) (Ms) Muir, Counsel for the defendant referred to a High Court decision in New Zealand and a number of High Court decisions in Fiji, where either an order for video evidence had been made or judges had expressed support for the concept and satisfaction that there was little or no procedural disadvantage, for the Court or the parties, in so doing.

Generally oral evidence should be given directly to and in the presence of the court. The plaintiffs insist upon the physical presence of the witnesses for cross examination. The defendant's application for departure from the usual practice is contested by the plaintiffs and counsel for the plaintiffs expressed the following concerns. (Reference is made to written submissions filed on 18-08-2020)

(19) *In Ms Tuiwawa's affidavit she deposes that overseas travel is not allowed except in exceptional circumstances. What is obviously missing from Ms Tuiwawa's affidavit is the following information:*

- i. The defendant claims to be operating a Real Estate business in Fiji but says nothing about who is in Fiji running the said business;*
- ii. Ms Tuiwawa says nothing at all about whether there are any witnesses in Fiji who can represent the Defendant in Court;*
- iii. Ms Tuiwawa says nothing at all about the witnesses i.e;*
 - i. Nothing about their positions within the Defendant;*
 - ii. Nothing about the type of evidence they will give;*
 - iii. Nothing about the relevance of their evidence of their evidence to the case;*
 - iv. Ms Tuiwawa says that the Defendant has four witnesses residing in Australia but says nothing why their evidence is relevant;*
 - v. The court has nothing before it to determine whether they are in fact relevant witnesses;*
 - vi. Ms Tuiwawa makes no effort to discuss what are the exceptional circumstances;*
 - vii. No evidence has been submitted by Ms Tuiwawa to show that these witnesses are currently resident in Australia;*
 - viii. The Defendant knew that the matter was set down for trial for many months but Ms Tuiwawa says nothing about what steps the witnesses have taken to come to Fiji*

(21) Mr Robert Edward Lowres, the Managing Director of the first and second plaintiffs states as follows in paragraph (8) of the affidavit in response sworn on 21-05-2020;

(8) *As to paragraphs 7 and 8, I object to Skype or any other kind of video link evidence from the Defendant's witnesses and say:*

- (a) *There are numerous documents that will have to properly tendered and marked as exhibits. In the absence of the authors of these documents in Court and a proper witness who is present in Court to tender the documents the trial will be prolonged.*
- (b) *The Plaintiffs and the Defendant have substantial claims and counter-claims, respectively and the demeanour of witnesses when they give evidence is crucial.*
- (c) *There are numerous documents that the Court will need to go through.*
- (d) *Ms. Tuiwawa does not explain the nature of the witness's evidence and their relevance to the Defendant's claim and the capacity under which these witnesses will be giving evidence.*
- (e) *At the present time we have no knowledge what evidence these witnesses will give,*
- (f) *Witnesses who give evidence from overseas via skype escape any form of accountability because the domestic courts lack jurisdiction to hold them responsible for perjury or contempt if they lie on oath. So, there is a risk that an overseas witness may not give truthful evidence via skype because of lack of any form of accountability.*

(22) Let me pause here for a moment to consider the nature of the proceedings before me. The proceedings commenced by the plaintiffs are founded on breach of contract. The plaintiffs claim that by contract dated 8th September 2010 the first plaintiff and the defendant (formerly known as Naisoso Residential Management Rights Limited) entered into a Management Rights Contract (the “**contract**”) for the total sum of AUD\$230,000.00 (Two Hundred and Thirty Thousand Dollars) exclusive of Value Added Tax (the “**Contract Price**”) to purchase the management rights of the Naisoso Development from the defendant. It is further claimed that pursuant to the Contract, the defendant was required to maintain a standard of professionalism required of a real estate agent to ensure a non-compete provision with the 1st and 2nd plaintiff. The Plaintiffs alleges that in breach of the Contract the defendant's Company failed to maintain a standard of professionalism required of a real estate agent. It is claimed that the 1st and 2nd plaintiff terminated the non-compete provisions of the Contract and the defendant has failed to accept the termination and claims that the 1st and 2nd plaintiff do not have the right to terminate the non-compete provisions. The plaintiffs allege that as a result of the defendant's breach of Contract, the plaintiff's termination of the non-compete provisions and the defendant's subsequent challenge, the 1st and 2nd plaintiff are restrained by the defendant from undertaking property resales. The plaintiffs say that they have suffered loss and damages as a result of the breaches alleged.

(23) Save that they admit that the defendant and the first plaintiff entered in to the Management Rights Contract for the total sum of AUD\$230,000.00, the defendant denies virtually every major premise in the plaintiff's case. The defendant denies:

- ❖ it has any duties or obligations, contractual or otherwise to the 2nd plaintiff, as the 2nd plaintiff is not a party to the contract and/or the covenant not to compete.
- ❖ that it failed to maintain a standard of professionalism required of a real estate agent, that it says that these allegations by the 1st plaintiff are blatantly false and fabricated, and were made by the 1st plaintiff in bad faith as a pretext to terminate its covenant not to compete,
- ❖ any breach of contract on its part, but admits that the 1st plaintiff purported to terminate the non-compete provisions of the contract on blatantly false and fabricated grounds.
- ❖ that 2nd plaintiff terminated the non-compete provisions of the contract, in as much as the 2nd plaintiff is not a party to the contract and has no locus standi thereunder.
- ❖ any breach by the defendant and denies that the plaintiffs have suffered any loss or damages or loss of reputation or are entitled to any damages, interests or costs.

The defendant alleges that the first plaintiff has breached the contract between them as follows;

- ❖ Failure to perform clause 10.2 (a) of the contract by acting to compete with the defendant in respect of sales of lots not owned by the 1st plaintiff both prior to and after the purported termination of the covenant not to compete;
- ❖ Failure to perform clause 10.2 (b) of the contract by not encouraging lot owners to appoint the defendant as their letting agent;
- ❖ Failure to properly implement the contract in respect of the exclusive real estate agency for lot re-sales in the structure of the residential precinct and the Body Corporate;
- ❖ Failure to provide a suitable location for a storage shed and failure to do so in a timely manner as required by special condition 4 of Schedule 1 of the contract, causing the defendant to incur substantial expenses for storage;
- ❖ Failure to comply with the covenant not to compete contained in special conditions 5.5 of Schedule 1 of the contract;

- ❖ Encouraging and or conspiring with others to challenge the validity of Article 31.3 of the Articles of Association of the Body Corporate despite having accepted consideration from the defendant for the exclusive resale rights set out therein;
- ❖ Encouraging others to ignore instead of complying with Article 31.3 of the Articles of Association;
- ❖ Falsely claiming breach of contract against the defendant on spurious grounds;

The defendant says it has incurred loss and damages from the 1st plaintiff's breach of contract, including the failure of the consideration paid by the defendant in respect of the letting and resale rights due to the 1st plaintiff's conduct and bad faith, the particulars of which are as follows:

PARTICULARS OF LOSS AND DAMAGES

- (a) Contractual consideration paid for lettings and resales – AUD\$230,000.00 and FJD \$178,123.37.
- (b) Consideration paid for template resale contracts – FJD \$7,601.00.
- (c) Lost or reduced commissions on resales and lettings – FJD \$818,052.87.
- (d) Lost or reduced commissions relating to breach of the covenant not to compete – FJD \$767,822.87.
- (e) Solicitors costs relating to disputes with or caused by the 1st Plaintiff – FJD \$79,712.51.
- (f) Storage costs incurred in absence of the storage shed – FJD \$140,866.66.

In short, the plaintiffs are on clear notice that no aspect of their pleaded case (except the existence and proper effect of the Management Rights Contract) forms common ground between the parties or is uncontested.

It is clear, therefore, that the plaintiffs will be expected to make good all the essential ingredients of its case.

- (24) **The primary matter, I take into account in the present action is that this case will involve a large number of documents. The defendant is adducing more than hundred documents.** The proceedings involve over a hundred documents, which are proposed to be the subject of cross-examination by the plaintiffs. A substantial documentation will be in issue. There is only one agreed document, i.e., Management Rights Contract. All the other documents are highly contested by the plaintiffs. I am particularly troubled by the defendant's large number of highly contested documents which are proposed to be the subject of cross-examination by the plaintiffs on the platform of video link, Skype or zoom in Australia. I am apprehensive about the possibility that the cross-examining party might be disadvantaged. The effectiveness of cross-examination as a weapon in the fight for truth should not be unduly hindered.
- (25) **Whilst I cannot speak for other judges,** the matter in contest before me involves major issues of credit and there is documentary material of some volume and complexity which is likely to be deployed in Court. Therefore, it is desirable, in my opinion, to have the witnesses in court for cross- examination.
- (26) Despite all the technological advances, in my opinion, allowing the defendant's witnesses to attend for cross-examination on the platform of video link or zoom in Australia (where the proceedings involved over a hundred documents which are proposed to be the subject of cross-examination) is unacceptable. There are problems in or maintaining a line of cross-examination, difficulties in presenting documents (documents have to be transmitted or produced in an unfamiliar manner) and the difficulty of assessing a witness. As a matter of justice, to both parties, this problem is critical.

As I understand the pleadings, evidence of defendant's witnesses goes to a substantial issue in the defendant's counter-claim, namely the existence of loss and the quantification of damages arising from the defendant's contention that the first plaintiff breached the contract between the defendant and the first plaintiff by ;

- ❖ Failure to perform clause 10.2 (a) of the contract by acting to compete with the defendant in respect of sales of lots not owned by the 1st plaintiff both prior to and after the purported termination of the covenant not to compete;
- ❖ Failure to perform clause 10.2 (b) of the contract by not encouraging lot owners to appoint the defendant as their letting agent;
- ❖ Failure to properly implement the contract in respect of the exclusive real estate agency for lot re-sales in the structure of the residential precinct and the Body Corporate;
- ❖ Failure to provide a suitable location for a storage shed and failure to do so in a timely manner as required by special condition 4 of Schedule 1 of the contract, causing the Defendant to incur substantial expenses for storage;

- ❖ Failure to comply with the covenant not to compete contained in special conditions 5.5 of Schedule 1 of the contract;
- ❖ Encouraging and or conspiring with others to challenge the validity of Article 31.3 of the Articles of Association of the Body Corporate despite having accepted consideration from the Defendant for the exclusive resale rights set out therein;
- ❖ Encouraging others to ignore instead of complying with Article 31.3 of the Articles of Association;
- ❖ Falsely claiming breach of contract against the Defendant on spurious grounds;

Therefore, it may be important to the plaintiffs to explore such matters in detail with the defendant's witnesses in person by reference to documents. It is impossible for me to resist the inference that the ability of the plaintiffs to test the defendant's witnesses evidence in relation to the counter-claim would be unfairly restricted if I am to direct that the cross-examination take place on the platform of video or zoom in Australia. Moreover, the court's capacity to supervise, control and deal with any issue which might arise from the cross-examination will be compromised.

- (27) I share the concerns expressed by *Spender J in Australian Competition and Consumer Commission v Word Netsafe Pty Ltd*¹ and *Stone J in Dorajay Pty Ltd v Aristocrat Leisure Ltd*².
- (28) The following passage of Buchanam J in "*Campaign Master (UK) Limited v Forty Two International Pty Ltd and Bluefreeway Limited*"³ is illuminating.

I am particularly troubled by the prospect (or possibility) that the cross-examination of an important witness might be rendered less effective by the limitations of video link technology or the absence of the witness from the courtroom. Although the days are gone when witnesses are expected to feel any sense of intimidation as an aid to telling the truth, there is no doubt in my mind that the requirement to give evidence on oath or affirmation in the (generally) solemn atmosphere of a courtroom in the presence of a judge, and to answer questions in cross-examination in the presence also of cross-examining counsel, has at least three potential benefits. It enhances the prospect that the witness will remain conscious of the nature and solemnity of the occasion and of his or her obligations. It affords the cross-examiner some

¹ (2002) 119FCR 303

² (2007) FCA 1502

³ (2009) FCA 1306

reassurance that the gravity and immediacy of the moment, and of the supervising presence of the judge, are not lost on the witness and the cross-examination is not thereby rendered any less effective, to the possible prejudice of the cross-examining party. It provides the Court with a more satisfactory environment in which to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court. To my mind there remains, even in the modern context, a certain “chemistry” in oral interchanges in a courtroom, whether between a judge and counsel (or other representative) or between cross-examiner and witness. I would not wish too lightly to deprive a cross-examiner of that traditional forensic element in the exchange although, as the cases universally make clear, the Court must now, if asked to do so, balance the interests of a cross-examining party against claimed inconvenience both in individual cases and with respect to individual witnesses. Notwithstanding the increased availability and use of video link technology, in my view, a case must be made out for the use of video link evidence if it is opposed by an affected party.

- (29) I think the criticisms voiced by Giles J in *Sunstate Airlines (Old) Pty Ltd v First Chicago Australia Securities Ltd*,⁴ are sound:

“The ordinary procedure is [that a witness gives oral evidence before a judge in a courtroom] and there are sound reasons for following it unless cause to the contrary be shown. The conduct of proceedings in open court, available to public scrutiny, is of great importance. Cross-examination may be more difficult when video evidence is taken because documents have to be transmitted or produced in an unfamiliar manner, because of delay in voice transmission, or for other reasons, and the effectiveness of cross-examination as a weapon in the fight for truth should not be unduly hindered. And in many cases the Court is assisted in fact by observance of what is misleadingly called the demeanor of the witnesses, upon which the taking of video evidence may impact. All that said, particularly where the evidence is relatively uncontroversial, the cross-examination is not likely to be lengthy, or no real issue of credit is involved, the taking of video evidence can be beneficial to the administration of justice and consistent with justice between the parties. It may permit the Court to receive the evidence of a witness that would otherwise not have been available, it may permit the evidence to be received without causing undue inconvenience to witnesses....”

(Emphasis added)

- (30) In *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd*⁵, Palmer J followed the approach suggested by Giles J noting at para 27:

⁴ unreported, SCNSW, 11 March 1997 at 4

“.....where the matter in contest involves major issues of credit or where documentary material of some volume and complexity is likely to be deployed in Court, it is still desirable, in my opinion, to have the witness in Court for examination, unless good reasons are shown to the contrary.”

I agree with those observations. I have no hesitation in rejecting the application.

- (31) Furthermore, in the case of witnesses who are remotely located, it will not be possible to see whether there is somebody coaching the witnesses or suggesting the answers. A serious potential prejudice would thereby impose on the plaintiffs. This is a further reason why I should not accede to the application.
- (32) The case before me in contest involves major issues of credit and there is documentary material of some volume and complexity which is likely to be deployed in court. It is desirable in my opinion, to have the witnesses in court for cross-examination and the evidence given viva voce. If I may adapt the words of Giles J in *Sunstate Airlines* (supra) where the evidence is relatively uncontroversial, the cross-examination is not likely to be lengthy, or no real issue of credit is involved, the taking of video evidence can be beneficial to the administration of justice and consistent with justice between the parties.

This is not such a case.

- (33) One difficulty which the defendant's summons faces is that, it does not appear from the affidavit of Ana Tuiwawa, sworn on 12-05-2020, the nature of the evidence sought to be adduced by video link or zoom, and the content and character of the evidence and its importance in relation to the issues in the case. The evidence not yet having been provided to the plaintiffs, or filed, it is not possible to know what significance it may have. The plaintiffs have a legitimate basis to know; (1) the nature and the content of the evidence sought to be adduced (2) Its importance in relation to the issues in this case. The evidence has not been disclosed and has been foreshadowed in only the most cursory fashion.

Therefore, at the moment there is an insufficient case to support the application.

In all the circumstances, I have very reluctantly come to the conclusion that the appropriate course is to decline the application.

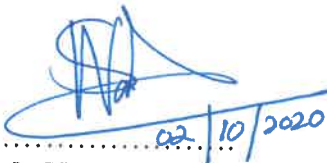
This case has not been pending for years. It would be possible, if now, dates are reserved soon, for the case to be heard early next year.

⁵ [2001] NSWSC 651

[E] **ORDERS**

- (01) Application is declined.
(02) There will be no order as to costs.




02/10/2020
Jude Nanayakkara
[Judge]

High Court – Lautoka.
Friday, 02nd October, 2020