The show must now go on

1. In the recent case of ***Bilta (UK) Ltd and others v SVS Securities Plc and others [2021] EWHC 36 (Ch)*** Mr Justice Smith considered an application on behalf of the Fifth Defendant, Traditional Financial Services ('TFS'), for an adjournment 1 week before the commencement of a 5 week trial. The case was to be heard in the Rolls Building as part of the Financial List.

2. TFS sought to adjourn it on the basis that 4 of their witnesses could not attend, 3 by reason of the new national lockdown and not feeling comfortable attending an in person hearing. The matter had already been adjourned at the beginning of the pandemic. In short, TFS submitted that it would be unfair to not have the witnesses in person. The Claimant, Bilta, submitted that it would not be unreasonable for the witnesses to attend and that the trial would still be fair if it were a hybrid hearing.

3. The matter concerned a claim for dishonest assistance alleged against TFS. Smith J acknowledged that witness credibility was going to be highly relevant to the determination of the case.

4. Smith J refused TFS's application for an adjournment on the basis of the suite of safety precautions that could be put in place for the witnesses and that if they refused to attend, he was content that the trial would still be fair if the witnesses were heard remotely.

5. Issues around adjournments have loomed large during Covid-19 and they are likely to continue to do so. Although focused on adjournments, this case also offers principles of general application to case management during Covid-19 and provides a useful summary of the state of play:

   "14.

   …

   (3) This has meant that many of the "old" rules – that would have pertained by default prior to the pandemic – either do not apply or apply in a radically different way. That applies to: the composition, filing and service of bundles; the use of technology;

and the manner and form in which hearings are conducted, observed and recorded. There has been a raft of guidance, protocols, rule revisions and rulings issued in light of the pandemic. By way of very broad summary:

a) *There has been a dramatic shift away from "in person" hearings to "remote" hearings. As a general rule of thumb – and it will be necessary to expand upon this – interlocutory hearings and other hearings not involving witnesses can, and therefore should, in light of the present prevailing circumstances, be heard remotely.*

a) *On the other hand, witness actions (and other hearings involving witnesses) need to be case managed with far greater circumspection and care, because of the importance of hearing witnesses.*

b) *As I have noted, there is a great of material seeking to assist judges in these circumstances. Although issued as a Practice Note in family proceedings, I have found the decision of the Court of Appeal in Re A (Children), [2020] EWCA Civ 583 to be of considerable help, and what follows draws very considerably on Re A.1*

c) *In all cases, "[t]he decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness [and] justice…An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceedin g that were open to the court and is, therefore, held to be wrong": Re A at [3(i)].*

d) *Guidance – including guidance from senior judiciary – is exactly that: guidance that cannot abrogate the judge's judicial decision as to the conduct of the hearing: Re A at [3(ii)]. Furthermore, "[t]he temporary*

nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered": Re A at [3(iii)].

e) *However, the guidance (in particular the message dated 9 April 2020 from the Lord Chief Justice, the Master of the Rolls and the President of the Family Division) noted, as regards witness actions (and other hearings involving witnesses), precisely the circumspection that I have adverted to"*

f) *in paragraph 14(3)(b) above. Where "all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if the parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way": quoted in Re A at [6].*

g) *The point is that <u>even if</u> all parties appear to be contending for a remote hearing, it is the court that is the ultimate arbiter of whether proceedings so conducted are or can be fair and proper. The position is the same where all parties are <u>opposed</u> to a remote hearing: this is a "very powerful factor" for the court to take into account, for reasons that are obvious. But, even such a consensus is not determinative.*

h) *In this case, one party (TFS) seeks an adjournment in preference to an "in person" hearing (which, it says, cannot properly take place) and in preference to a "remote" hearing (which, it says, would be unfair). Bilta, by contrast, opposes an adjournment and is prepared to conduct the trial either in person or remotely. It would be invidious to seek to characterise TFS's objections (including those of the witnesses) as "very powerful" or merely "powerful" or to use some other d escriptor of their weight. I will simply say that they are – and this is self-evident – obviously material to the decision that I have to make. <u>How material</u> depends upon all the facts*

and circumstances, judicially considered and I will not seek – in advance of such consideration – to pigeon-hole them.

i) In [9] of Re A, a number of relevant factors were identified that feed into the judge's decision as to the appropriate format of the hearing of a matter. It is helpful to quote this paragraph, but I stress that I do not regard the range of relevant factors as in any way closed (as the Court of Appeal itself made clear):

…

(4) The caution with which a court should approach the question of remote hearings where witnesses are to be heard reflects the importance of witness evidence in English civil procedure,[2] and the significance of cross-examination. As was noted in R (Dutta) v. General Medical Council, [2020] EWHC 1974 (Admin 414 at [39(iii)], "[t]he general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness". It follows from this that <u>any</u> form artificial intermediation interposed between the questioners of a witness and the judge hearing that witnesses evidence <u>must be</u> a derogation from the "gold standard". That does not mean that such a process cannot be fair or proper. But I do consider that I must approach the relative benefits of "in person" versus "remote" hearings in this light in the case of witness actions (and other hearings involving witnesses).

6. An obvious, but important point is that this summary is not short nor is it simple and neither are case management decisions during Covid-19.

7. A point of note is the emphasis put on guidance being guidance. It follows that just because a Judge in reaching a case management decision has departed from the relevant guidance, does not necessarily mean an appeal of their decision will be successful. Another interesting point is how this decision continues to normalise the application of guidance from other areas of law.

8. There is no suggestion by Smith J that in person cross examination's stock has been diminished as a result of the roll out of hybrid hearings. A question that members of the Bar have no doubt considered themselves to which the final answer remains unclear.

9. At paragraph 15 Smith J commends the advocates for not referring him to the traditional procedure and case law for adjournments. This is an important insight into the psyche of judges during the pandemic. These are *unprecedented times* and judges need submissions that address the issues the court faces on the day.

10. At paragraph 19, Smith J offers a raft of potential case management directions. Smith J states that these measures should be enough for it to be reasonable to expect a witness to attend. They can be summarised as follows:

    a. A "supercourt" be allocated to the case (for those of you, like myself, who are yet to grace the Financial List of the Rolls Building, a super court is as it sounds, an extremely large courtroom built specially for multi-party cross jurisdictional disputes, there are only 3)
    b. Only parties and lead advocates are allowed in the courtroom
    c. The witness box should be 5 metres away from the witness
    d. The witnesses will deal with papers electronically
    e. Ushers and clerks will leave the courtroom
    f. Specific start times for evidence
    g. The witness and legal teams will each have their own conference room
    h. The court timetable will alter

11. Smith J is to be commended for his commitment. However, one questions how realistic it is to expect other judges to create a bespoke safety plan for each case. Many court centres do not have the resources or space. Most judges may also not have the time. In addition, is determining a hearing 'safe' the kind of responsibility that should be placed on the judiciary's shoulders?

12. Smith J, in keeping with Covid-19 jurisprudence, states that not having the Gold Standard of cross examination does not mean that a trial ceases to be fair.

13. In concluding, Smith J caveats his judgment at paragraph 21, making clear that this was a case predominantly about money, and if there were other 'extreme adverse consequences' on the table, then his decision would be very different. A useful takeaway from this is if you can demonstrate that your civil dispute has wider reaching ramifications than purely monetary, it may favour against an adjournment.

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.

Lachlan Stewart
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