EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2015/0117
CLAIM NO. BVIHC (COM) 2019/0067

BETWEEN:

PT VENTURES SGPS SA

Claimant

and

VIDATEL LTD

Defendant

Appearances:

Ms. Akesha Adonis of Maples and Calder for the claimant
Ms. Tamara Cameron for the defendant
Ms. Maya M Barry for the Attorney-General as *amicus curiae*

2020 July 24
July 27

JUDGMENT

[1] **JACK, J [Ag.]**: By an application issued on 23rd July 2020 the claimant, PT Ventures, seeks the following orders:

> "1. Permission, pursuant to CPR 2.7(4), CPR 29.3 and the [Covid-19] Emergency Measures [Practice Direction], that:
>
> a. the trial of these proceedings shall be conducted wholly as a remote video hearing in accordance with the provisions of the Emergency Measures PD, subject to any further order or direction of the Court.
>
> b. the technology platform to be used for this purpose shall be Zoom Business video conference, operated by the International Dispute Resolution Centre in London.

> 2. In addition, the parties have permission pursuant to paragraph 10.2 of the Emergency Measures PD to arrange a live transcript of the trial listed to be heard on 27-31 July 2020.
>
> 3. The live note operators are permitted along with providing remote access to real-time transcripts to record the proceedings and provide an electronic presentation of evidence."

[2] The application was supported by the defendant, Vidatel. Because it raised important issues, where the parties were effectively in dispute with the Registry, I thought it appropriate to direct that the Registry serve Her Majesty's Attorney-General with a copy of the application, so that the Attorney might appear either on behalf of the Registry or as *amicus curiae*. In the event, Ms. Maya M Barry from the Attorney-General's chambers appeared as *amicus curiae*. I am grateful to her for her assistance. Her submission was that on each of the limbs of the application I had a discretion to grant or refuse the application.

[3] The underlying case concerns the enforcement of an arbitration award for US$646,445,968 given by a Paris arbitration panel in favour of PT Ventures against Vidatel. I have delivered two judgments in this matter already. One dealt with an application for summary judgment by PT Ventures. The other concerned an application by Vidatel to adduce evidence of Angolan law. On the first I granted summary judgment on some issues, refused it on one other and adjourned one issue to trial. On the second I refused permission to rely on Angolan law. The trial of the outstanding issues is due to begin on Monday 27th July 2020. I therefore heard the application of 23rd July on Friday 24th July.

Virtual hearing with a third party Zoom provider

[4] The first order sought has two parts: (a) that the trial be heard virtually; and (b) that a London-based Zoom system be used. (a) is uncontroversial. The borders to the British Virgin Islands are largely shut as a result of the pandemic. Counsel from England and the experts on French law (the only witnesses) cannot fly into the Territory. In the recent case of **Kathryn Ma Wai Fong (as Executrix of the**

Estate of the late Wong Kie Nai) v Incredible Power Ltd and others[1] Wallbank J heard the trial of the action completely remotely. There were difficulties caused by the different time-zones, but from a technical point of view the trial has gone well. There can be no complaint that justice could not be done under such circumstances. Accordingly, I approve (a).

[5] Limb (b) raises quite different issues. The Court provides a Zoom service, which has operated very satisfactorily since 2017. The main difficulties which have arisen during the pandemic, where almost all matters have had to be heard remotely, have been a result of band-width problems, but these are obviously outwith the control of the Zoom operator, whether the operator is internal to the Court or external. There is no technical difficulty using with the Court's Zoom service, which has provided a good service during the pandemic.

[6] The external system proposed by the parties allows particular pages of the bundles to be flashed up electronically. That would be an advantage if electronic bundles were to be used during the trial, but in fact physical bundles have been provided. These work perfectly satisfactorily without the difficulties caused by having to navigate electronic bundles. It is suggested that it might be easier for witnesses to use electronic bundles instead of physical bundles, but in general physical bundles are easier to deal with that electronic bundles unless multiple screens are available.

[7] It is for the Court to provide the facilities for litigation to take place. It is not for the parties to do so. This is a clear distinction from the position in relation to arbitration. When hearing a case in Court, a judge is exercising the power of the State. The State has a duty to treat all litigants the same.

[8] Further, the Court needs to ensure the security and control of its proceedings. If a third party provider were used, the Court would have no means of ensuring the suitability of the employees operating the external Zoom service. Nor could it

[1] BVIHC (COM) 2015/0047.

ensure, for example, that no unauthorized recording was made by the external service provider. The Court would have no means of ensuring that journalists or members of the public who wished to attend the virtual hearings could do so. With a service provider in London, there would in practice be no means of enforcing any orders of the Court against the service provider.

[9] For these reasons, I refuse (b). The trial will proceed with the Court's own Zoom system.

Live-note transcript

[10] I turn then to the use of the Live-note system. I do not know the precise details of the system which it is proposed be used next week. Generally, there is a team of two who make the transcript. One operates a computer assisted transcription machine, a CAT machine; the other checks the transcript in real time and makes corrections. In addition, although this is not necessary for making a real-time transcript, the Live-note system will make an audio recording of what is said, so that any issues can be checked when finalizing the overnight transcript. I assume this is, at least in outline, what is proposed.

[11] It can be seen that there are two aspects to this: first the making of the transcript and second the making of the audio recording. Each needs to be considered separately.

[12] The **Recording of Court Proceedings Act 1995**[2] provides, so far as material:

> "3(1) Notes of evidence or a record of the proceedings in a Court may be taken down or recorded mechanically or by any other means, where a Judge, Magistrate or other person presiding over a Court, is required by law to
>
> (a) take down notes of evidence; or
> (b) cause notes of evidence to be taken down; or
> (c) make a record of the proceedings.

[2] No 4 of 1995, Laws of the Virgin Islands.

> (2) The notes of evidence or record of proceedings taken down or recorded in accordance with subsection (1) shall be the official record of the Court.
>
> 4. The Registrar or Clerk of the Court shall cause a transcript, of the notes of evidence or record of proceedings taken down or recorded in accordance with section 3(1), to be prepared as soon as practicable after the close of proceedings each day.
>
> 5. A transcript prepared in accordance with section 4 shall be verified by a certificate of the person responsible for the accuracy of the taking or recording of the evidence or proceedings and the transcript."

Section 7 provides for the making of the official transcript under section 4 and its verification under section 5 by the Court Reporters (although this expression is not used in the Act).

[13] The drafting of these sections is liable to confuse, because "record" is used in two senses. The first is in the sense of an audio or video recording ("recorded mechanically"). The second is used in the sense of "the official record of the Court". Historically, this was kept on vellum rolls, but now consists of the paper Court files. Except insofar as transcripts are put on the Court file, the documents on the Court file are not a verbatim record of what occurs in Court, rather the file consists of the formal steps taken by the Court, such as copies of the orders made by the Court and documents lodged by the parties.

[14] Under section 3(1), there are two alternative ways of the Court preparing its official record: either contemporaneous notes of evidence can be taken, by shorthand or longhand or typed (for example, on a CAT machine), or a mechanical audio or video recording can be made. In either case, a transcript must be made: section 4, and verified by the Court Reporter: section 5. Once verified, the transcript is the official copy of the Court record of the hearing. Save for judgments, where a judge has the power and duty to check and revise any oral judgment delivered,[3] this official transcript must be used for any appeal.

[3] Bromley v Bromley [1965] P 111.

[15] The rather confused language of the Act has led to the view being expressed that only the Court Reporter can make a transcript of proceedings. This is true insofar as the *official* transcript of proceedings is concerned. Does it, however, prevent the making of *unofficial* transcripts?

[16] In **Regina (on the application of Ewing) v Crown Court at Cardiff**,[4] Mr. Ewing had attended the hearing of an appeal to the Crown Court from the Magistrates' Court by a Mr. Kirk, who had a long history of vexatious litigation. Mr. Ewing attended, at least ostensibly, as a member of the public and took notes of what occurred. Mr. Ewing as long ago as 1989 had been declared a vexatious litigant.[5] The presiding judge held that he could only take notes if he had the Court's permission, which the judge refused to give. Given Mr. Ewing's history, the Court was obviously entitled to be wary of Mr. Ewing's motives for taking a note in Court.

[17] Burnett LJ, as he then was, sitting in the Queen's Bench Divisional Court, was considering Mr. Ewing's application for judicial review of that refusal. He held:

> "16 The common law has long upheld the principle that open justice is central to the rule of law. It has been repeated on many occasions at the highest level. **Scott v Scott**[6] is often cited as the founding modern authority where Lord Halsbury said, at p 440: 'I am of opinion that every court of justice is open to every subject of the King'. An important aspect of the principle is that justice must be administered in public. The general rule is that the public and representatives of the media have the right to attend court hearings. The importance of the presence of the media is that they may report what occurs. Open justice helps to keep all those involved in the process up to the mark. It ensures public scrutiny of what is being done in the courts and assists in maintaining public confidence in the administration of justice. It also reduces the risk of inaccurate and ill-informed comment on court proceedings.

---

[4] [2016] EWHC 183 (Admin), [2016] 4 WLR 21.

[5] That had not prevented him from appearing in a substantial number of reported cases: see Ewing v Times Newspapers Ltd, 2015 Gib LR 39 http://gcs.gov.gi/images/judgments/supremecourt/2014/terence_patrick_ewing_v_times_newspaper_17_november_2014.pdf and Ewing v Times Newspapers Ltd (No 2), 2015 Gib LR 49 http://gcs.gov.gi/images/judgments/supremecourt/2014/terence_patrick_ewing_v_times_newspaper_19_november_2014.pdf

[6] [1913] AC 417.

17 This aspect of the principle of open justice may be curtailed in limited circumstances, generally dictated by Statute or Rules of Court… The important corollary of open justice, namely that what has been said and has happened in court may be freely reported and discussed outside court, is also subject to carefully controlled restrictions.

…

22 It is court staff who generally have direct dealings with members of the public attending court and who are regularly asked by them about the appropriate way to behave. It is the staff in the first instance who must be vigilant about the use of cameras, mobile phones and the like. Many members of the public who attend court are on unfamiliar territory, are nervous and seek help from court staff. To assist them in the discharge of their functions, Her Majesty's Courts and Tribunals Service ('HMCTS') has produced guidance for its criminal court staff which includes a section entitled 'Note taking in the public gallery of criminal courts'. It does not have authoritative legal status but reflects the understanding of HMCTS of the correct position.

> 'It is accepted that justice is administered in open court where anyone present may listen to and report what is said. There can be no objection to note taking in the public gallery unless it is done for a wrongful purpose; for example to brief a witness who is not in court on what has already happened. This may occur in the Crown Court, where witnesses who have yet to give evidence are usually kept out of court and in civil cases where a judge has directed that a future witness should be out of court while other evidence is being given, or the hearing is in chambers. Court staff need to be alert, but it is not for them to prohibit the practice. Courts should not place notices in the court building forbidding note taking. If any member of the court staff sees a member of the public taking notes and there is some reason to suspect it might be for an improper purpose, he or she should report the matter to the clerk of the court (or to the judge…) and ask for directions. The clerk should, if possible, make inquiries of the member of the public concerned or direct an usher to do so. If the result of the inquiry does not allay suspicion, the matter must then be reported to the judge.'

23 In my judgment this guidance is correct in identifying the default position as being that those who attend public court hearings should be free to make notes of what occurs. It is a feature of the principle of open justice that those attending public hearings should ordinarily be able to make notes of what occurs. For any number of reasons a visitor to a court may wish to have a record of the proceedings for later use or out of interest. In this jurisdiction there is no good reason why the starting point should be that note-taking is not allowed unless permission has been sought and granted. Note-taking by members of the public is unlikely,

> without more, to interfere with the due administration of justice. The reasons for a distinction being drawn between ordinary members of the public and journalists and legal commentators in connection with live text-based communications… do not apply to ordinary note-taking.
>
> 24 The default position is subject to the control of the court which, for good reason, may withdraw the liberty to make notes. The paramount question for the judge if considering withdrawing that liberty would be whether the note-taking in question would be likely to interfere with the proper administration of justice."

[18] The reference to taking notes must include making a verbatim note. Although fewer people write in shorthand nowadays, anyone is in my judgment entitled (unless there is some good reason to forbid them from doing so) to make their own personal transcript. Likewise (so long as no disturbance is caused, for example, by noise) anyone is entitled to use a laptop computer in Court. The same should apply to a CAT machine, subject to there being sufficient room to set up the machine.

[19] What applies to members of the public must apply *a fortiori* to members of a party's legal team. In any case of substance, it would normally be a dereliction of duty for a firm of lawyers not to arrange for a note to be taken of the submissions and evidence in a case. If the note-taker can make a verbatim note or transcript, so much the better. The transcript is not, for the reasons I have given, the official transcript, but if an advocate or a party wants an unofficial transcript, in the absence of very exceptional circumstances there is in my judgment no good reason for the Court to prevent his or her arranging for the making of one.

[20] In my judgment, there is no good reason for prohibiting the parties agreeing to pay for a Live-note team to prepare a real-time transcript.

[21] This was the conclusion drawn by Wallbank J in the **Incredible Power** case, where a similar application for a Live-note transcript was made. He said[7] that the 1995 Act:

> "makes provision for the taking of an official transcript for a fee of proceedings, if I can summarise it. It does not, on the fact of it, preclude the use of live note taking. And, indeed, it is an open Court matter. So if a member of the public were to want to come and sit in the courtroom and take their note of it, then they would be entitled to do so, of course, but it is not for publication.
>
> And since this live note seems to be purely as an aide-memoire for the parties and their lawyers in the matter, from my very limited consideration of the legal issue, I do not see that it impinges upon the monopoly of the Court Reporting Unit to provide an official transcript of the proceedings, nor does it impinge upon their entitlement to charge a fee for that service.
>
> What [it is], is not a transcript of proceedings, it is a note of proceedings that the parties can refer to for their own use. And hence, subject to any further submissions that might be made and further consideration that the Court might in due course have to give to this type of request, I see no difficulty with it."

[22] Now there were some special circumstances in that case, in that one of the parties, who was also a witness, was disabled and suffered from deafness. In the absence of a Live-note transcript, the witness was likely to face difficulties in following the proceedings. Thus, if there was a discretion to be exercised before permission to use Live-note could be given, there were strong grounds for exercising it in favour of allowing Live-note transcription. However, the judge does not, at least in this passage, appear to put his approval on that basis. The **Ewing** case does not appear to have been cited to him. Nonetheless what he says is consistent with that case and with the view I have expressed above. The only point which may require further consideration in the light of **Ewing** is the judge's *obiter* comment that a member of the public may not publish their own note of proceedings, however, this issue does not arise in the current case.

[7] Oral judgment of 24th June 2020, unrevised.

Recording

[23] This leads to the last point of difficulty: the taking of a recording by the Live-note team for checking the transcript overnight. Here the starting position is different. Para 10 of the **Covid-19 Emergency Measures Practice Direction**[8] provides:

> "10.1 At any hearing of the Court, the proceedings will be recorded by the court by such recording equipment as approved by the Chief Justice.
>
> 10.2 No party or member of the public may use unofficial recording equipment at any hearing or in any court or judge's chambers without the prior authorization of the presiding judge.
>
> 10.3 The court recording, whether in written, audio or other digital form, shall be the official transcript of the proceedings."

[24] Para 10.2 indicates in my judgment that there must be some good reason for the Court to permit an unofficial recording to be made. In the current case, there are two reasons why in my judgment there is no sufficiently good reason to authorize the making of an unofficial recording. Firstly, it is unnecessary. The parties are arranging to have an overnight official transcript prepared by the Court Reporters. The unique selling point of the Live-note service is that it provides a real-time transcript, which the Court Reporters cannot, or cannot yet, offer. An overnight transcript from the Court Reporters is the official record. For that reason alone it is to be preferred to an unofficial transcript, no matter how professionally prepared. Secondly, there are security issues, if unofficial recordings of Court proceedings held within the jurisdiction are made and kept outside the jurisdiction. The considerations outlined above in para [8] apply equally.

[25] Weighing these considerations in my judgment there is no sufficiently good reason for allowing the Court proceedings to be recorded by the Live-note team.

[8] No 3 of 2020.

Conclusion

[26] Accordingly, I will make the orders requested in paras 1(a) and 2 of the application and refuse the order sought in paras 1(b) and 3.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar