



Neutral Citation Number: [2020] EWHC 3082 (TCC)

Case No: HT-2019-000124

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 17/11/2020

Before :

MR JUSTICE KERR

Between :

(1) DAVID HUBER
(2) ELENA LIESKOVSKA

Claimants

-and-

(1) X-YACHTS (GB) LIMITED
(2) X-YACHTS A/S
(a company incorporated under the laws of Denmark)

Defendants

Mr Richard Slade (of Richard Slade & Company, Solicitors) for the Claimants
Mr Robert Grey (instructed by Direct Access) for the Defendants

The court received written submissions

Approved Judgment

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MR JUSTICE KERR

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is 10am on 17 November 2020

Mr Justice Kerr:

1. This is my ruling with brief reasons on arrangements for a trial by remote hearing fixed to start on 30 November 2020. Fraser J on 23 October 2020 directed that “[t]he trial shall be conducted remotely using Skype for Business or such alternative platform as the trial judge may order.” I fully concur with that direction; indeed, in the present circumstances the trial could not take place in any other way since the parties are based in Spain and Denmark and cannot travel to England at present. No adjournment is sought by either side.
2. The claim arises from alleged defects in the *Silver X*, a yacht supplied by the defendants to the claimants in May 2009. The issues are: on what terms the claimants contracted to buy the yacht; whether ownership transferred; if so, on what terms; whether the yacht was defective; whether the claimants are entitled to reject her; whether they have validly done so; whether they are entitled to damages; and if so, in what amount. The claim is for upwards of €500,000.
3. The trial is fixed for six days from 30 November 2020. I am assigned as trial judge. The claimants are represented by solicitors and counsel. The defendants are represented by direct access counsel, though Fraser J has directed that they consider also appointing solicitors before the trial starts and that they must either appoint solicitors or explain their reasons for not doing so.
4. The claimants are currently in Mallorca. In the pre-trial checklist filed on 21 October 2020, the claimants sought a remote hearing on the following basis:

“Due to the unprecedented COVID virus situation. The First Claimant is in [an] at-risk category, being older than 60 years old. The Second Defendant is a company incorporated in Denmark. Its representatives would need to travel to the UK to attend an in-person hearing, which is unreasonable in the current climate.”
5. The claimants’ witnesses of fact are the two claimants in Mallorca, who are husband and wife. The defendants’ witnesses of fact are Mr Jens Ole Skott, based in Haderslev, Denmark; and Mr Stuart Abernethy, based in Hamble, Southampton. Each side will call one expert in biodeterioration and one expert in yacht surveying, making a total of four experts. I understand the experts are all based in England.
6. The defendants or their associated companies (collectively **X-Yachts**) are located in Southampton, Denmark and the Republic of Ireland. The second defendant is incorporated in Denmark. The company secretary of the England and Ireland based companies is Ms Deborah Weldon. Following Fraser J’s direction, she emailed my clerk on 13 November 2020 asking that various named individuals be permitted to attend the hearing remotely from Ireland and Denmark as well as England.
7. The twelve named individuals from Denmark are all connected to X-Yachts, the *Silver X*, the claimants or this case in various ways. They include Mr Skott who is a witness, various shareholders and employees of X-Yachts companies and its Danish lawyer. From Ireland, permission to attend remotely is sought for Ms Weldon herself, who has coordinated the defence of the claim, and for Mr Conor Fanning, who is the managing director of the first defendant.

8. Ms Weldon's request must be read in the light of the defendants' counsel, Mr Grey, subsequently submitting in writing (as I shall shortly mention) that the court is not empowered to permit remote access to the trial for anyone outside the jurisdiction. Mr Grey did not expressly countermand Ms Weldon's request. I will assume that her request stands and should be considered if I reach the view, contrary to Mr Grey's submissions, that I have power to authorise the attendance of the 14 named individuals in Ireland and Denmark.
9. It is common ground that all witnesses of fact and expert witnesses can give their evidence by video link, whether from within or from outside the jurisdiction. There is no difficulty about this. The issue that has arisen is whether the parties and others can attend and observe the remote hearing from locations outside England and Wales, other than when giving evidence. I alerted the parties to the question whether that would be lawful and have received submissions on the issue by email in the last few days.
10. From those submissions the issues that emerged are as follows: (i) should the court direct a video only hearing (ii) if so, would persons outside England and Wales be allowed to attend by video link. As to (i), the claimants positively encourage me to do so and the defendants do not object to that course, which is clearly in harmony with Fraser J's direction. I am content to make such a direction pursuant to section 85A(1) of the Courts Act 2003 (added by section 55 of and schedule 25 to the Coronavirus Act 2020).
11. I therefore direct that the proceedings are to be conducted wholly as video proceedings. I am therefore empowered to direct further "that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear the proceedings" (s.85A(1)(a)). The question is whether such "members of the public" must attend from a location in England and Wales, or whether they may do so from elsewhere.
12. The claimants submit that I can permit persons to attend remotely from outside this jurisdiction (England and Wales). They assert that this would not infringe the prohibition against the High Court sitting outside England and Wales implicit in section 71 of the Senior Courts Act 1981, which provides that "[s]ittings of the High Court may be held, and any other business of the High Court may be conducted, at any place in England or Wales".
13. The claimants' submissions were made through Mr Richard Slade, their solicitor. They rely on *Peer International Corporation v. Termidor Music Publishers Ltd* [2005] EWHC 1048 (Ch). Lindsay J held at [8] that he was not prevented by section 71(1) from taking evidence abroad, in Cuba, as an examiner under CPR rule 34.13; were he to do so, the court would not be sitting outside England and Wales.
14. The claimants submit that if a judge taking evidence in Cuba is not caught by section 71 "it is difficult to see how someone listening from abroad to proceedings that do not involve the judge setting foot outside the jurisdiction could be." Mr Slade submits further that where the current pandemic makes a video only hearing necessary, "nothing takes place in the courtroom" and "the transmission itself is the hearing rather than being a transmission of a face-to-face hearing".

15. Mr Slade recognised the concerns expressed by the Divisional Court in *Gubarev v Orbis Business Intelligence Limited* [2020] EWHC 2167 (QB), [2020] 4 WLR 122 (a hybrid hearing case) that remote attendance reduces the court’s ability to maintain control of the proceedings and enhances the opportunity for misuse; see the judgment of the court given by Dame Victoria Sharp P at [48]ff. It must be recognised, further, that remote attendance from outside the jurisdiction makes the sanction of contempt of court more difficult to enforce.
16. The defendants submit, through their counsel Mr Grey, that section 85A does not empower the court to permit the broadcasting of proceedings to locations outside England and Wales. Mr Grey points out that section 85B of the 2003 Act creates criminal sanctions for unauthorised transmission of an image or sound which is being broadcast in accordance with a direction under section 85A of the 2003 Act.
17. The defendants assert that the customary warning against such unauthorised transmission given at the start of remote hearings would be of little use if persons are attending from overseas, beyond the reach of the court’s coercive powers. They submit that *Peer International* is not in point; it turns on its facts and is, in Mr Grey’s words, “certainly not a precedent for the holding of the hearing being held simultaneously in different jurisdictions”.
18. The defendants submit, accordingly, that while witnesses can give their evidence by video link from outside England and Wales, observers cannot attend remotely from outside England and Wales. This would apply to witnesses, even if they are also parties, save when they are giving their evidence. They could not be permitted to attend the hearing remotely before or after giving their evidence, for example, to hear what is said by another witness.
19. The question whether I can permit remote attendance from outside England and Wales in a video only hearing is one of construction of section 85A of the 2003 Act. As Lord Hoffmann observed in *Lawson v. Serco Ltd* [2006] ICR 250 at [6], the question of territorial scope of always one of construction and:

“requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration? (per Lord Wilberforce in *Clark v. Oceanic Contractors Inc* [1983] 2 AC 130, 152)”.
20. In my judgment, the claimants’ submissions are to be preferred. I do not interpret the silence in the statutory provisions on the issue I have to decide as an implicit prohibition against permitting remote attendance from outside England and Wales. There are good reasons for concluding that the intention to be imputed to Parliament is to the contrary. They are, briefly, as follows.
21. First, I consider the backdrop against which the 2020 Act was enacted. It includes the policy of keeping the courts running as far as possible and using technological means to do so. Civil litigation before the courts of England and Wales frequently has international dimensions. Parliament must be taken to have had that in mind. Long before the pandemic, civil litigation here frequently included the now commonplace feature of remote attendance by a witness giving evidence from abroad.

22. Next, it was well known when the 2020 Act was passed that the prevalence of the virus and the concern of states to inhibit its spread were causing widespread restrictions on international travel and would lead to a commensurate increase in the use of electronic communication techniques to keep conversations going across international borders. Viewed in that light, a prohibition against allowing remote attendance of civil proceedings from abroad seems parochial.
23. Furthermore, the narrow construction of section 85A of the 2003 Act proposed by the defendants has obvious drawbacks which could create unfairness and inequality of arms. In a case such as this one, the claimants themselves would be prevented, apart from when giving their evidence, from remotely attending the trial of their own case, being in Mallorca and unable to travel to England.
24. While the right to attend the hearing of one's own case is not absolute (see *Attorney General of Zambia v. Meer Care & Desai (a firm)* [2006] EWCA Civ 390 per Sir Anthony Clarke MR at [43] (in which *Peer International* was mentioned at [38] and [49])), it is obviously undesirable that parties should be unable to attend the trial of their own claim unless absolutely necessary.
25. Furthermore, on the defendant's construction, where a party's witnesses happen to be in the jurisdiction, they would (unless the court orders otherwise) be able to see and hear what other witnesses say; while witnesses located outside the jurisdiction would not.
26. That is potentially unfair and can also be inconvenient and make the court's task of assessing the evidence, and the witness's task of giving evidence, more difficult. An expert giving evidence from Denmark would not be able to hear what her or his counterpart giving evidence from Wales had said to the judge; and so forth. I find it difficult to impute to Parliament an intention to bring about such consequences for civil litigation.
27. Nor do I accept Mr Grey's proposition that the court would be sitting in "multiple locations" and all of them must therefore be within England and Wales. That analysis applies to hybrid proceedings where the court hearing proceeds outwards from a physical location. As is now well known, in such a case the statutory provisions do not:

"restrict the transmission of pictures and sounds from one court to another court: in those circumstances, the second court is simply an extension to, and thus part of, the court, subject to the usual rules and restrictions that a court can and does impose. ..."; *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 528 (Admin) [2019] EMLR 2016 (per Hickinbottom LJ at [30]).
28. The same analysis applies to remote attendance from within England and Wales in the case of a hybrid hearing; the remote location from which the person attends is designated as part of the court. That is not so where the hearing is video only. I accept the submission of Mr Slade that in such a case the transmission *is* the hearing and is not a copy of it. I do not accept Mr Grey's proposition that in a video only hearing broadcast outside England and Wales the court is sitting simultaneously in more than one jurisdiction.

29. In a video only hearing, the location of the judge must be in England and Wales, but in accordance with section 71(1) of the Senior Courts Act 1981 may be anywhere in England and Wales, including the judge's home: see *Re Blackfriars* [2020] EWHC 845 (Ch) at [37] (per Mr John Kimbell QC sitting as a judge of the High Court). The absence of any difficulty with section 71(1) of the 1981 Act leaves room for CPR rule 2.7 to operate: "[t]he court may deal with a case at any place that it considers appropriate."
30. For completeness, I have not overlooked the point that in the case of Northern Ireland there is an express provision that a direction for participation by a person in legal proceedings there may be given "in respect of a person whether the person is in the United Kingdom or elsewhere" (para 5(1) of schedule 27 to the 2020 Act, given effect by section 57). Neither party relied on that provision and I do not think it should affect the analysis or leads to a different conclusion.
31. I come next to the question what directions to give under section 85A(1)(a) concerning the manner in which the proceedings are to be broadcast for the purpose of enabling persons to see and hear them. This is a matter of discretion, but the court must be very cautious in exercising it, for all the reasons laid bare by the *Gubarev* case, mentioned above. It may well be a rarity for the court to be willing to permit remote attendance from abroad, for those very reasons.
32. In the present case, I am willing on a cautious basis to permit some remote attendance from abroad, subject to safeguards. If the safeguards to which I am coming are in place, the risk of abuse is low. The dispute is an ordinary private one arising from the acquisition of the *Silver X* for leisure purposes. The dispute has no particular international or political sensitivity or ramifications beyond the interests of the parties.
33. Without some remote attendance from abroad, a fair trial will be made more difficult and an adjournment is undesirable and not sought by either side. Travel from Denmark now is impossible and from the Balearic isles difficult, and that is likely to remain the position for some considerable time yet.
34. Looking at the various features of this case, I think the right thing to do is make an order permitting remote attendance from abroad of one person for each party (an officer of choice in the case of the corporate defendants), plus Ms Weldon (the nearest equivalent to the defendants' solicitor) from Ireland and Mr Skott (also a witness) from Denmark. Attendance from within England and Wales should be permitted on similar terms to those now usual in a hybrid hearing.
35. The hearing will be held in public in the usual way. Other interested persons or members of the public, including representatives of media organisations, will be able to attend from within England and Wales, subject to observing the same safeguards. The parties' legal representatives will be able to attend, again from within England and Wales.
36. The legal representatives on each side will bear responsibility for informing all those attending remotely of the strict prohibition against any unauthorised dissemination of the hearing or making any sound or video recording of it. They will also be responsible for ensuring that any person or entity enlisted to provide technical support or assistance is made aware of those strict prohibitions.

37. Persons attending, whether from inside or outside the jurisdiction, will have to provide a signed undertaking confirming that they are aware of the contents of the court's order (provided to them by my clerk or the parties' representatives) and that they understand they are prohibited from broadcasting, disseminating or recording the proceedings further by any electronic means and that if they do so they may be found in contempt of court and liable to criminal penalties.
38. I include these safeguards in my order giving directions for the remote hearing, which for ease of reference is attached as an annex to this judgment. I am grateful to the parties for their written submissions.

ANNEX

DIRECTIONS FOR REMOTE HEARING OF THE TRIAL

UPON considering the case file, the hearing bundles and the order of Mr Justice Fraser sealed on 23 October 2020 directing that the trial be held by means of a remote hearing

AND UPON receiving and considering written submissions from the claimants' solicitor, Mr Richard Slade, and the defendants' counsel, Mr Robert Grey

IT IS ORDERED AS FOLLOWS:

1. The remotely conducted trial ordered by Fraser J (at paragraph 7 of his order made on 23 October 2020) will take place in accordance with the following arrangements.
2. The trial will be conducted wholly as video proceedings pursuant to section 85A(1) of the Courts Act 2003.
3. The remote hearing will be held in public in accordance with CPR rule 39.2.
4. The remote hearing will take place using the Teams platform unless the parties are informed otherwise.
5. The parties' solicitors on the record, if any, may attend remotely from within England and Wales.
6. The parties' counsel shall attend remotely from within England and Wales.
7. The witnesses of fact may, if located outside England and Wales, give their evidence by live video link from their locations in Spain and Denmark.
8. The expert witnesses, being located in England and Wales, may give their evidence remotely from within England and Wales.
9. The expert witnesses may attend the full trial remotely from within England and Wales.
10. Each of the claimants may attend the full trial remotely from their current location in Mallorca, Spain.
11. One representative of choice for each defendant may attend the full trial remotely from that person's current location in England and Wales, the Republic of Ireland or Denmark.
12. Mr Jens Ole Skott may attend the full trial remotely from Denmark.
13. Ms Deborah Weldon may attend the full trial remotely from the Republic of Ireland.

14. Except as aforesaid, remote attendance from outside England and Wales is not permitted. Remote attendance from within England and Wales is permitted subject to further permission of the court and subject to the safeguards below.
15. No person whether within or outside England and Wales may attend the trial remotely unless by 5pm on Friday 27 November 2020 they provide (via the parties' legal representatives or directly) by email to Mr Justice Kerr's clerk a signed undertaking in the following terms:

“I confirm that I have read a copy of the order of Kerr J dated 17 November 2020 and understand that I am prohibited from broadcasting or disseminating further the proceedings in this case by any electronic means or making any sound or video recording of it and that if I do so I may be found in contempt of court and liable to criminal penalties including a fine or imprisonment.”
16. By 5pm on Friday 27 November 2020 the parties or their solicitors shall email to the judge's clerk the identity of each person whom that party wishes to attend remotely for or on behalf of that party, giving details of the capacity in which they will attend, the address from which they will do so, and their email and telephone contact details.
17. Screen sharing: for the avoidance of doubt, this order does not prohibit persons not mentioned in it from viewing the proceedings sharing the screen of an electronic device used by a person authorised by this order to attend the proceedings remotely, provided that the person sharing the screen has no control over the electronic device.
18. Providers of technical assistance: the parties' legal representatives are responsible for ensuring that any person providing technical assistance to a person authorised by this order to attend the trial remotely is made aware of the content of this order and that they must not facilitate any remote attendance outside the terms of this order.
19. Costs in the case.