



PRACTICE DIRECTION No. 6 OF 2020

FINANCIAL SERVICES DIVISION: PRACTICE DIRECTION MODIFYING STANDARD REMOTE HEARING PRACTICE DURING CORONAVIRUS PANDEMIC AND UNTIL FURTHER NOTICE.

Introductory

1. On March 28, 2020, the Chief Justice issued a Press Release entitled ‘*The Courts’ response to the Shelter in Place Regulations*’: www.judicial.ky. In relation to the Financial Services Division (“FSD”), it was stated that:

“ • In the FSD the use of video-conferencing and teleconferencing will be encouraged and implemented where possible. The practice is particularly well established in the FSD where Judges frequently preside over interlocutory proceedings in Court from the UK (and other places) by video-link. However, given the travel bans, it now seems likely that substantive trials will also have to be taken by these means as much as possible, even where the designated judge resides overseas.

• And so, in keeping with Grand Court Rules Order 33 rule 1, the Secretary of State for Foreign Affairs has confirmed, through the Office of the Governor that he consents to Grand Court judges presiding from the UK for trials in Cayman by way of video-link. Updated Practice Directions on Video-link Proceedings will be issued shortly.

• Parties and their attorneys are advised to contact the FSD Registrar and/or Listing Officer to identify those cases which must proceed by way of video-link and to confirm the arrangements with the designated Judges: bridget.myers@judicial.ky or yasmin.ebanks@judicial.ky.

• Subject to the directions of the Judge in each case, the use of electronic bundles is especially encouraged at this time to reduce the need for photocopying and circumstances for the transmission of COVID-19.

2. An important aspect of ensuring that more cases than usual can proceed through video conference hearings (“VCR”) and/or on the papers is the availability of a mechanism for the electronic filing of cases without having to physically deliver documents to the Court.

On 6 April 2020, the Chief Justice issued Practice Direction No. 2 of 2020: *'The Use of Electronic Signatures, Court Seals and Stamps'*. This may also be viewed on the Court's website: www.judicial.ky.

3. The FSD Judges are available to hear cases remotely notwithstanding the current pandemic using VCR and applications on the papers as the norm rather than the exception. This will, where necessary, extend to trials as well as interlocutory applications. Traditional oral hearings in Court will remain the ideal form of hearing in many cases in which instance it is hoped that the parties will agree adjournments until the case may be orally heard in Court. While the Shelter in Place Regulations remain in force, the FSD will give priority to cases of urgency. As noted in the Chief Justice's 28 March 2020 Press Release reproduced in part above:

"Parties and their attorneys are advised to contact the FSD Registrar and/or Listing Officer to identify those cases which must proceed by way of video-link and to confirm the arrangements with the designated Judges: bridget.myers@judicial.ky or yasmin.ebanks@judicial.ky."

4. This Practice Direction seeks to clarify the main ways in which the established FSD practice is likely to be modified, on a case by case basis, through the expanded use of remote hearings necessitated by the impracticability of conducting Court hearings as a result of the COVID-19 Pandemic.

Existing practice on remote hearings

5. The Grand Court Rules regulate the circumstances in which hearings may be held outside the jurisdiction ((O.32, r.28 applies to interlocutory hearings and O.33, r.1 applies to trials). These are supplemented by practice directions (see the Schedule below) and the FSD Users' Guide (see section B2.4 which is set out in the Schedule below). These FSD protocols for video-conference hearings ("VCF"), developed for part-time and full time non-resident judges and applications on the papers (set out in the Schedule hereto), provide a valuable platform for responding to the present crisis. The key elements of the existing regime which require explicit modification are:

- (a) the requirement that the judge is participating from overseas;
- (b) the restriction of the VCF regime to interlocutory applications;
- (c) the requirement that an application for VCF will be made by a party as opposed to being initiated by the Court;

- (d) the requirement that the parties should be physically present at a hearing in the Court.
6. As far as the applications on the papers regime is concerned, the key elements of the existing regime which require explicit modification are:
- (a) the assumption that an application for a hearing on the papers can only be made by a party as opposed to being proposed by the Court;
- (b) the assumption that a hearing on the papers will only in exceptional circumstances be ordered absent the consent of both parties.

Changing the existing practice on remote hearings: governing legal principles

7. In considering what potential changes should be made to the existing regime, on a case by case basis, the following guiding principles in section 7 of the Bill of Rights (which is substantially based on article 6 of the European Convention on Human Rights) must always be borne in mind:
- (a) every litigant has the fundamental right to a fair and public hearing within a reasonable time;
- (b) the public may be excluded from proceedings where the Court is empowered by law to do so, *inter alia*, (1) where publicity would prejudice the interests of justice, and (2) in interlocutory proceedings.
8. The Grand Court Law enables the Court to regulate its practice through its own rules (section 18(1)), but filling any gaps by reference to current English High Court practice. On March 25, 2020, the Master of the Rolls and the Lord Chancellor issued Practice Direction 51Y (PD) in relation to video and audio hearings during the Coronavirus pandemic. The UK Judiciary website (www.judiciary.uk/announcements) describes the main objects of the modified practice in relation to remote hearings as follows:
- *clarify that the court may exercise the power to hold a remote hearing in private where it is not possible for the hearing to be simultaneously broadcast in a court building. It may do so consistently with the power to derogate from the principle of open justice and may do so under the provisions of this PD in addition to the bases for doing so set out in CPR 39.2. Where such an order is made under the PD the provisions in CPR 39.2(5) do not apply;*
 - *confirm that the court may not conduct a remote hearing in private where arrangements can be made for a member of the media to access the remote*

hearing. It makes clear that in such circumstances the court will be conducting the hearing in public;

- *clarifies that the court may direct that where it conducts a remote hearing in private, the court must, where it is practicable to do so, order that the hearing is recorded. Where it has power to do so, it may order the hearing to be video recorded, otherwise where a recording is to be made it should be an audio recording. Available powers to order such hearings to be recorded, and subsequently broadcast, apply to the Court of Appeal (Civil Division) through The Court of Appeal (Recording and Broadcasting) Order 2013 and are expected to apply more generally through s.85A of the Courts Act 2003, which is intended to be inserted by the Coronavirus Bill;*
- *where a remote hearing is either audio or video recorded, any person may apply to the court for permission to access the recording."*

9. The English practice confirms that this Court should only have a non-public remote hearing where it is constitutionally permissible to have a private hearing, and that best efforts should be made to provide public access to any remote hearing either while it is taking place or by providing if possible a video recording afterwards.

10. The overriding objective of the Grand Court Rules is that civil cases should be managed in a way which is designed to achieve, *inter alia*, the following objectives:

"(a) ensuring that the substantive law is rendered effective and that it is carried out;

(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;

(c) saving expense..."

11. GCR O.33, r.1 provides that the trial [regarded as distinct from an interlocutory hearing] of a cause or matter, or any question or issue arising therein, may take place outside the Cayman Islands where for some special reason the Court so orders and the Secretary of State for Foreign and Commonwealth Affairs has certified that neither he nor the authorities in the country concerned have any objection to the Court sitting in such country. The Secretary of State for Foreign and Commonwealth Affairs has confirmed that for the duration of the Coronavirus emergency the trial of any FSD cause or matter, or any question or issue arising therein, may take place in the United Kingdom.

Remote hearings: the modified approach

12. During the Coronavirus pandemic, and for so long as it is not possible to safely conduct

in person hearings which would ordinarily be open to the public or for non-resident judges (and counsel who have obtained limited admission for the relevant application and matter) to travel to the Cayman Islands, FSD Judges may consider the appropriateness in light of the principles summarised above of:

- (a) directing VCF hearings whether or not the Judge, the parties or counsel are in the jurisdiction or abroad;
- (b) directing VCF hearings in respect of final and not just interlocutory matters, provided that appropriate safeguards to ensure public access to the hearing or a record of the hearing can be put in place (and where there is video link to the Court assigned to the matter the requirement for providing sufficient public access will usually be treated as having been satisfied) ;
- (c) directing that an application which would typically be heard on the papers should be heard on that basis without both parties' consent, where it appears that substantive justice would be more undermined by delay than by directing that an oral hearing should take place.

13. The existing practice of the FSD in relation to the above matters and which are set out in the Schedule below shall continue to apply, subject to such modifications as may be required for any particular case. Any modifications will be guided by the principles set out above.

SCHEDULE: Current Practice Directions

1. PD No, 1/2010, which relates to hearings by telephone and by video link, provides at para.10:
 - *Judges of the FSD may conduct CMCs and, in appropriate cases, hear summonses for directions and interlocutory applications by means of telephone or video conferences when they are off the Island and, pursuant to para 10.2 and paras 9.4 and 9.5, where a hearing takes place by way of a telephone conference call, the etiquette requires that all participating attorneys must be on line before the appointed time, so that the Judge will be the last person to join the conference, whereupon he will ask all the participants to identify themselves. Telephone hearings may not be tape recorded without the consent of the Judge. If the Judge permits or directs that the hearing be tape recorded, he will direct that a written transcript be prepared, sent to the Judge and circulated amongst the parties. Whenever a hearing is not tape recorded, the note taken or approved by the Judge will constitute the official record.*

2. PD2/2012 also relates to interlocutory hearings (whether by telephone or by video link) by a Judge who is physically overseas (but see para B2.4 of the FSD Users Guide below for the usual practice nowadays):

1. Introduction

1.1 This practice direction applies to all applications seeking the sanction of the Court for the use of video conferencing (VCF),

1.2 The purpose of this practice direction is to explain and clarify certain procedures and arrangements necessary in this relatively new method of taking evidence in trials or in other parts of any legal proceedings, for example, interim application case management conferences and pre-trial reviews. Further guidance is given in the Video Conferencing Guide appended to this practice direction.

1.3 VCF equipment may be used both (a) in a Courtroom, whether via equipment which is permanently placed there or via a mobile unit, and (b) in a separate studio or conference room. In either case, the location at which the Judge sits is referred to as the "local site". The other site or sites to and from which transmission is made are referred to as "the remote site(s)" and in any particular case any such site may be another Courtroom.

2. Preliminary arrangements

2.1 The Court's permission is required for any part of the proceedings to be dealt with by means of VCF. Before seeking a direction, the applicant should notify the listing officer or other appropriate Court officer of the intention to seek it, and should enquire as to the availability of Court VCF equipment for the day or days of the proposed VCF.

2.2 The application for a direction should be made to any of the Judges of the Grand Court. If all parties consent to a direction, permission can be sought by letter, fax or e-mail, although the Court may still require an oral hearing. All parties are entitled to be heard on whether or not such a direction should be given and as to its terms. If a witness at a remote site is to give evidence by an interpreter, consideration should be given at this stage as to whether the interpreter should be at the local site or the remote site.

2.3 If a VCF direction is given, arrangements for the transmission will then need to be made. The Court will ordinarily direct that the party seeking permission to use VCF is

to be responsible for this. That party is hereafter - in civil cases -referred to as 'the VCF arranging party'.

2.4 .The VCF arranging party must contact the listing officer or other appropriate officer of the Court and make arrangements for the VCF transmission. Details of the remote site, and of the equipment to be used both at the local site (if not being supplied by the Court) and the remote site (including the number of ISDN lines and connection speed), together with all necessary contact names and telephone numbers, will have to be provided to the listing officer or other Court officer. The Court will need to be satisfied that any equipment provided by the parties for use at the local site and that at the remote site is of sufficient quality for a satisfactory transmission.

3. Costs

3.1 Subject to any order to the contrary, all costs of the transmission, including the costs of hiring equipment and technical personnel to operate it, will initially be the responsibility of, and must be met by, the VCF arranging party. All reasonable efforts should be made to keep the transmission to a minimum and so keep the costs down. All such costs will be considered to be part of the costs of the proceedings and the Court will determine at such subsequent time as is convenient or appropriate who, as between the parties, should be responsible for them and (if appropriate) in what proportions.

4. Recording

4.1 The VCF arranging party must arrange for the recording equipment to be provided by the Court so that the evidence may be recorded at the local site.

4.2 Application for a direction from the Court must be made for the provision of recording equipment at the remote site by the arranging party.

4.3 No other recording may be made of any proceedings via VCF, save as directed by the Court.

3. Paragraph B 2.4 of the FSD Users Guide provides as follows:

(a) Ideally an application for a proposed application to be heard by telephone or by video link should be made to the assigned Judge before he or she goes overseas so that all the relevant considerations can be fully ventilated at an oral hearing in chambers. However, if that is not feasible in the circumstances, the request for a proposed application to be heard by telephone or by video link when the assigned Judge is already overseas will in practice usually be addressed in the first instance to the assigned Judge's PA, who will be in direct contact with the Judge and can most easily and quickly transmit the request direct to the Judge. The request should be supported by a letter from the applicant's attorney explaining in detail why the request is being made, whether the proposed application will be supported or opposed by any other party, why it is not possible or desirable to await the Judge's return, how much supporting documentation in the form of evidence, authorities etc. is involved and how long the hearing is likely to take. It is entirely a matter for the discretion of the assigned Judge whether to hear the application at all while off the Island and, if so, whether by telephone or by video link. All communications with the Judge must be made through the Judge's PA; no direct communication with the Judge is permitted. If the Judge agrees to hear the application by telephone or video link the applicant's attorney must liaise with the Judge's PA who will be responsible for all practical arrangements.

(b) In determining whether or not to hear a proposed application by telephone or video link the assigned Judge will usually consider whether the proposed application is sufficiently urgent and important to justify the time, inconvenience and cost of it being heard by telephone or video link. The Judge will also take into account how long the hearing is likely to take and how long it will be before he or she would be able to hear the application on Island.

(c) The assigned Judge will usually only agree to hear an application by telephone if it is relatively straightforward, not highly contested and will not last more than a maximum 2 hours unless there are special circumstances.

(d) An application for a witness to be allowed to give evidence by video link, whether in a hearing when the Judge is overseas or in a hearing or trial when the Judge is not overseas, will usually only be granted in very exceptional circumstances. Unless the proposed evidence of the witness is purely formal and will not involve any significant cross-examination, the Court will be very reluctant to grant such an application. Amongst other things, there will be concerns as to the Judge's ability to satisfactorily assess the witness's

demeanour, objectivity and reliability over a video link and the ability to ensure that no one else is present unseen with the witness who may be able to prompt the witness. Such concerns will be exacerbated if the witness requires an interpreter. The strong preference of the Court is to see and hear the evidence of a witness in person.

(e) The current video conferencing guide is set out on the next page.

4. The Video Conferencing Guide currently set out in the FSD Users' Guide provides as follows:

VIDEO CONFERENCING GUIDE

This guidance is for the use of video conferencing (VCF) in civil proceedings. It is in part based upon the protocol of the Federal Court of Australia and CPR 32 Practice Direction of the Courts of England and Wales. It is intended to provide a guide to all persons involved in the use of VCF, although it does not attempt to cover all the practical questions which might arise.

VIDEO CONFERENCING GENERALLY

1. VCF may be a convenient way of dealing with any part of proceedings: it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs, It is, however, inevitably not as ideal as having the witness physically present in Court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation, In particular, it needs to be recognized that the degree of control a Court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it.

2. When used for the taking of evidence, the objective should be to make the VCF session as close as possible to the usual practice in a trial Court where evidence is taken in open Court. To gain the maximum benefit, several differences have to be taken into account. Some matters, which are taken for granted when evidence is taken in the conventional way, take on a different dimension when it is taken by VCF: for example, the administration of the oath, ensuring that the witness understands who is at the local site and what their various roles are, the raising of any objections to the evidence and the use of documents.

3. It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a Court by means

of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8 below) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the Court what those inquiries were and of their outcome.

4. Time zone differences need to be considered when a witness abroad is to be examined in the Cayman Islands by VCF. The convenience of the witness, the parties, their representatives and the Court must all be taken into account. The cost of the use of a commercial studio is usually greater outside normal business hours.

5. Those involved with VCF need to be aware that, even with the most advanced systems currently available, there are the briefest of delays between the receipt of the picture and that of the accompanying sound. If due allowance is not made for this, there will be a tendency to 'speak over' the witness, whose voice will continue to be heard for a millisecond or so after he or she appears on the screen to have finished speaking.

6. With current technology, picture quality is good, but not as good as a television picture. The quality of the picture is enhanced if those appearing on VCF monitors keep their movements to a minimum.

PRELIMINARY ARRANGEMENTS

7. The VCF arranging party must ensure that an appropriate person will be present at the local site to supervise the operation of the VCF throughout the transmission in order to deal with any technical problems.

8. It is recommended that the Judge, practitioners and witness should arrive at their respective VCF sites about 20 minutes prior to the scheduled commencement of the transmission.

9. If the local site is not a Courtroom, but a conference room or studio, the Judge will need to determine who is to sit where. The VCF arranging party must take care to ensure that the number of microphones is adequate for the speakers and that the panning of the camera for the practitioners' table encompasses all legal representatives so that the viewer can see everyone seated there.

10. The proceedings, wherever they may take place, form part of a trial to which the public is entitled to have access (unless the Court has determined that they should be heard in private). If the local site is to be a studio or conference room, the VCF

arranging party must ensure that it provides sufficient accommodation to enable a reasonable number of members of the public to attend.

11. In cases where the local site is a studio or conference room, the VCF arranging party should make arrangements, if practicable, for the Royal Coat of Arms to be placed above the Judge's seat.

12. In cases in which the VCF is to be used for the taking of evidence, the VCF arranging party must arrange for recording equipment to be provided by the Court which made the VCF direction so that the evidence can be recorded. An associate will normally be present to operate the recording equipment when the local site is a Courtroom. The VCF arranging party should take steps to ensure that an associate is present to do likewise when it is a studio or conference room. The equipment should be set up and tested before the VCF transmission. It will often be a valuable safeguard for the VCF arranging party also to arrange for the provision of recording equipment at the remote site. This will provide a useful back-up if there is any reduction in sound quality during the transmission, A direction from the Court for the making of such a back-up recording must, however, be obtained first. This is because the proceedings are Court proceedings and, save as directed by the Court, no other recording of them must be made. The Court will direct what is to happen to the back-up recording.

13. Some countries may require that any oath or affirmation to be taken by a witness accord with local custom rather than the usual form of oath or affirmation used in the Cayman Islands. The VCF arranging party must make all appropriate prior inquiries and put in place all arrangements necessary to enable the oath or affirmation to be taken in accordance with any local custom.

That party must be in a position to inform the Court what those inquiries were, what their outcome was and what arrangements have been made. If the oath or affirmation can be administered in the manner normal in the Cayman Islands, the VCF arranging party must arrange in advance to have the appropriate holy book at the remote site. The associate will normally deliver the oath.

14. Consideration will need to be given in advance to the documents to which the witness is likely to be referred. The parties should endeavour to agree on this. It will usually be most convenient for a bundle of the copy documents to be prepared in advance, which the VCF arranging party should then send to the remote site.

15. Additional documents are sometimes quite properly introduced during the course of a witness's evidence. To cater for this, the VCF arranging party should ensure that equipment is available to enable documents to be transmitted between sites during

the course of the VCF transmission, Consideration should be given to whether to use a document camera. If it is decided to use one, arrangements for its use will need to be established in advance. The panel operator will need to know the number and size of documents or objects if their images are to be sent by document camera. In many cases, a simpler and sufficient alternative will be to ensure that there are fax transmission and reception facilities at the participating sites.

THE HEARING

16. The procedure for conducting the transmission will be determined by the Judge. He will determine who is to control the cameras. In cases where the VCF is being used for an application in the course of the proceedings, the Judge will ordinarily not enter the local site until both sites are on line. Similarly, at the conclusion of the hearing, he will ordinarily leave the local site while both sites are still on line. The following paragraphs apply primarily to cases where the VCF is being used for the taking of the evidence of a witness at a remote site. In all cases, the Judge will need to decide whether Court dress is appropriate when using VCF facilities. It might be appropriate when transmitting from Courtroom to Courtroom. It might not be when a commercial facility is being used.

17. At the beginning of the transmission, the Judge will probably wish to introduce himself and the advocates to the witness. He or she will probably want to know who is at the remote site and will invite the witness to introduce himself and anyone else who is with him. The Judge may wish to give directions as to the seating arrangements at the remote site so that those present are visible at the local site during the taking of the evidence. The Judge will probably wish to explain to the witness the methods of taking the oath or of affirming, the manner in which the evidence will be taken, and who will be conducting the examination and cross-examination. The Judge will probably also wish to inform the witness of the matters referred to in paragraphs 5 and 6 above (co-ordination of picture with sound, and picture quality).

18. The examination of the witness at the remote site should follow as closely as possible the practice adopted when a witness is in the Courtroom. During examination, cross-examination and re-examination, the witness must be able to see the legal representative asking the question, and also any other person (whether another legal representative or the Judge) making any statements in regard to the witness's evidence. It will in practice be most convenient if everyone remains seated throughout the transmission.

5. The FSD Users' Guide also makes the following provision for applications on the papers:

B1.1 APPLICATIONS —ON THE PAPERS

B1.1(a) Although contested applications are usually best determined at an oral hearing, some applications may, in the discretion of the Judge, be suitable for determination on the papers without the need for an oral hearing.

B1.1(b) If the applicant considers that the application may be suitable for determination on the papers, he should ensure before filing the papers that:

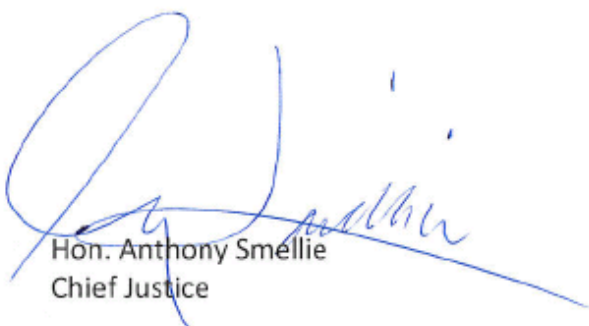
- (i) the application, together with any supporting evidence, has been served on the defendant/respondent (if any);*
- (ii) the defendant/respondent (if any) has been allowed the appropriate period of time in which to serve evidence in opposition;*
- (iii) any evidence in reply has been served on the defendant/respondent (if any); and*
- (iv) there is included in the papers the written consent of the defendant/respondent (if any) to the disposal of the application on the papers without an oral hearing.*

B1.1(c) An application to be disposed of on the papers will not require a summons. There should however be a supporting letter from the applicant's attorney.

B1.1(d) Only in the most exceptional cases will the Court dispose of an application on the papers in the absence of the consent of the defendant/respondent (if any) to the Court doing so. If an application is or is likely to be opposed the Court will usually require an oral hearing, in which case the applicant should file and serve a summons in the usual way

B1.1(e) The Applicant must submit a draft proposed order with the papers. The draft proposed order must expressly state that the Judge considers the application to be suitable to be disposed of on the papers without the need for an oral hearing.

B1.1(f) Any application for an interim injunction or similar remedy will normally require an oral hearing.



Hon. Anthony Smellie
Chief Justice

9 April 2020.