Adjournment in the time of the pandemic

By Christina Trahanas

Caselaw database searches indicate that there have been over 100 applications for adjournments in various courts and tribunals in Australia on the basis of the current COVID-19 pandemic (**pandemic**).

This case note summarises three decisions of the Federal Court and one decision of the Supreme Court of NSW in which adjournment applications were made. They are, respectively, *Capic v Ford Motor Company of Australia Limited* [2020] FCA 486 (***Capic***), *Australian Securities and Investments Commission v GetSwift Limited* [2020] FCA 504 (***GetSwift***), *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd* [2020] FCA 549 (***Motorola***) and *Quince v Quince* [2020] NSWSC 326 (***Quince***).

In *Capic* and *GetSwift*, the Federal Court dismissed adjournment applications. In each case, the judge (Perram J in *Capic* and Lee J in *GetSwift*) considered the necessity of the Court continuing to function during the pandemic against practical difficulties that might arise in a large and long virtual hearing. Their Honours each found that these practical difficulties were not insoluble and would not lead to an unfair hearing such that adjournment was required.

In *Quince* and *Motorola*, the Supreme Court and the Federal Court, respectively, granted an adjournment. In *Quince*, the Supreme Court (Sackar J) acceded to the request to vacate a virtual hearing because the case raised an allegation of forgery and would involve cross-examination of the first defendant on matters of credit. In *Motorola*, the Federal Court (Perram J) adjourned a hearing because the inability of witnesses to attend the hearing and the potential unlawfulness of hearing their evidence virtually gave rise to a risk that the rule in *Browne v Dunn* would be 'jettisoned'.

Capic

The case was set down for a six-week hearing commencing on 15 June 2020. The respondent applied for an adjournment.

The issue before the Court was whether s 37M of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and considerations of

fairness meant that a mode of trial conducted over virtual platforms was not feasible and that the trial had to be postponed: at [6].

Section 37M of the FCA Act provides that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to the law, and as quickly, inexpensively and efficiently as possible.

Justice Perram found that although a virtual hearing was challenging, it would not result in an unfair or unjust trial. His Honour refused the adjournment.

In arriving at this decision, Perram J considered a number of difficulties raised by the respondent (at [8]), which may be encountered if there was a virtual hearing. These were:

- intermittent internet connections: at [10]-[12];
- practitioners not being together physically for the trial: at [13];
- difficulties in conferring with expert witnesses in the lead up to the trial and in expert witnesses conferring to prepare a joint report or to give concurrent evidence: at [14]-[15];
- practical problems with lay witnesses who, for example, did not have a computer or who did not know how to use a computer: at [16]-[19];
- document management in a virtual courtroom would be difficult: at [20];
- the risk that problems may eventuate in the future, such as practitioners falling sick: at [21]; and
- a virtual hearing would be prolonged and more costly: at [22].

Justice Perram found that these issues were tiresome, inconvenient and undesirable but not insurmountable: at [10]-[11], [13], [14]-[15], [17], [19]-[22]. His Honour had regard to the fact that technology has improved and was continuing to improve: at [17], [19], [20]. His Honour also noted that the case had been pending for years. It commenced in 2016 and had already been set for trial twice: at [1], [24].

GetSwift

Two proceedings were scheduled to be heard sequentially in the Federal Court.

The Australian Securities and Investments Commission commenced the first proceeding (**ASIC Proceeding**) against GetSwift Limited (**GetSwift**) and certain of its officers, including the managing director (**Mr McDonald**). A 6-week hearing on liability was scheduled to commence on 9 June 2020.

The second proceeding (**Class Action**) canvassed substantially the same issues as the ASIC Proceeding. The respondents were GetSwift and Mr McDonald. A four-week hearing on common issues and the determination of the representative applicant's claim was scheduled to commence on 17 August 2020.

The defendants in the ASIC Proceeding applied to adjourn the ASIC Proceeding. An adjournment of the ASIC Proceeding would have led to an adjournment of the Class Action hearing.

Justice Lee found that it was possible for a virtual trial to be conducted fairly (at [30]) and dismissed the adjournment application.

His Honour acknowledged the practical difficulties – similar to those raised in *Capic* – of running a virtual hearing but considered that they could be overcome through cooperation between the parties and the Court in the lead up to and during the hearing and 'the use of some imagination': at [29], [31], [34].

Justice Lee also acknowledged the serious nature of the allegations in the ASIC Proceedings. However, his Honour considered that in the ordinary course these allegations should be determined as quickly as the business of the Court and fairness allowed. His Honour did not "'… perceive any real risk of practical injustice' of at least such a dimension as to mean that the case ought not proceed': at [38], [40].

Common themes in *Capic* and *GetSwift*

The issues raised in *Capic* and *GetSwift* were similar. In addition to the matters summarised above, the following points are of note.

First, Perram J in *Capic* and Lee J in *GetSwift* acknowledged the competing interests at play. These included the extraordinary nature of the health crisis that had arisen during the pandemic and that the Federal Court had to continue performing its judicial function without prejudice to the parties and in circumstances where cessation of business was not viable: *Capic* at [3]-[6], [19], [23], [25]; *GetSwift* at [7]-[9], [38]. Their Honours each noted that the present situation was not ideal, but that the Court and the parties had to try their best to make their hearings work: see, e.g., *Capic* at [25]; *GetSwift* at [30], [35].

Second, Perram J in *Capic* and Lee J in *GetSwift* commented on the logistics and implications for cross-examination of witnesses virtually.

In *Capic*, Perram J noted at [19] that previous authorities underscoring the unsatisfactory nature of cross-examination by video link were not made in the context of the pandemic nor with the benefit of platforms such as Microsoft Teams, Zoom or Webex. His Honour observed:

> *My impression of those platforms has been that I am staring at the witness from about one metre away and my perception of the witness' facial expressions is much greater than it is in Court. What is different – and significant – is that the video link technology tends to reduce the chemistry which may develop between counsel and the witness. This is allied with the general sense that there has been a reduction in formality in the proceedings. This is certainly so and is undesirable. To those problems may be added the difficulties that can arise when dealing with objections.*

In *GetSwift*, Lee J observed at [33]:

> *To the extent that demeanour does play an important role in assessing the evidence of witnesses, then my experience, particularly in the recent trial that I conducted, is that there is no diminution in being able to assess the difficulty witnesses were experiencing in answering questions, or their hesitations and idiosyncratic reactions when being confronted with questions or documents. Indeed, I would go further and say that at least in some respects, it was somewhat easier to observe a witness closely through the use of the technology than from a sometimes partly obscured and (in the Court in which I am currently sitting) distant witness box.*

Third, Perram J in *Capic* drew on his experience in running a virtual hearing in March 2020 – for example, senior and junior counsel communicated via WhatsApp; the judge and his associates communicated using an instant messaging platform: at [13]. Similarly, Lee J noted the Court's and his Honour's experiences with virtual hearings but stated that each case was unique: at [25], [30].

Quince

Section 5B of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) states that a NSW court may direct that a person give evidence by audiovisual link; however, the court must not make such a direction if, among other things, the direction would be unfair to any party to the proceeding.

Justice Sackar vacated the hearing for the presentation of lay evidence, finding that unfairness arose from the inability to cross-examine the first defendant in a conventional setting: at [15], [17], [20]. The plaintiff claimed that certain transfers or shares were forgeries and sought to cross-examine the first defendant about the forgeries: at [5], [7]. Also, there was no clear documentary trail or other circumstantial evidence: at [7]-[8]. Justice Sackar stated at [8] and [16]:

> The exercise clearly depends upon a careful analysis of the facts and a careful observation of all concerned, which would include, [the plaintiff] as well because one must assume his credit will also need careful scrutiny. …
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> [I]t does seem to me that when allegations of this sort are made and where there is not an abundance of corroborative or other material, demeanour, rightly or wrongly, may well play a very significant part in the determination ultimately of whether such a serious allegation would be made out on a Briginshaw or s 140 basis.

Motorola

The respondent requested the adjournment as several of the respondent's witnesses were located within the mainland of the People's Republic of China. They could not attend the hearing and it was arguably not possible to cross-examine them via video link without permission from China. The process for obtaining permission was slow: at [2]-[3].

Although the applicant did not require the affected witnesses for cross-examination, it stated that it intended to submit that the Court should not accept their evidence: at [4]. Related to this, in due course, the applicant stated that it would contend that there was an exception to the rule in *Browne v Dunn* where a witness was not allowed to enter Australia to give evidence nor allowed to give evidence from China by video: at [6].

In deciding to vacate the hearing, Perram J weighed various prejudices to the parties, and found that the scales favoured the respondent. The applicant was exposed to the prejudice of the matter, which was part-heard, being delayed for an uncertain duration: at [12]. In addition, the applicant sought a general injunction restraining the respondent from infringing its copyright and patents, which could be undermined if the hearing was vacated: at [13]-[15]. The respondent was exposed to the risk that it may be denied the opportunity to present exculpatory material: at [8]-[11]. Justice Perram stated that he felt 'distinctly uneasy about commencing a hearing in which one possible outcome is the jettisoning of an important rule of cross-examination': at [16]. BN