

**AVL hearings: some considerations during COVID-19**

1. The recent disruption to conventional forensic procedures for the hearing of civil disputes due to COVID-19 is apparent. Social distancing and self-isolation require the use of technology to facilitate virtual hearings in place of the physical courtroom.
2. In NSW, the courts' power to conduct hearings by audio-visual link is derived from ss 61 and 62 *Civil Procedure Act 2005* (NSW), the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) (**AVL Act**) and r 31.3 Uniform Civil Procedure Rules. The conduct of proceedings by AVL in the Federal Court is permitted and regulated by ss 47 to 47G *Federal Court of Australia Act 1976* (Cth). Sections 66 to 73 *Federal Circuit Court of Australia Act 1999* (Cth) are in similar terms.
3. In both NSW and the Commonwealth, the courts have a discretion to receive appearances, evidence and submissions by AVL, but must not permit AVL hearings where certain minimum technological requirements are not met. In NSW, there are three additional circumstances in which the courts must not permit AVL hearings in AVL Act s 5B(2). Of these, it is “*unfairness to a party*” (AVL Act s 5B(2)(c)) which is most significant.

**Minimum technological requirements**

4. It has become common practice for courts to direct at a pre-trial review that a “protocol” be settled to facilitate hearings by AVL. The protocol will list every person involved in the case, and how and when it is proposed that person participate. The protocol is intended to prevent technological and logistical problems from arising during the course of a trial by identifying all such requirements in advance. A proper protocol should satisfy a court that minimum technological requirements will be met.

5. 7 Wentworth Selborne has prepared a short guide to virtual protocols, which can be accessed at:

<https://7thfloor.com.au/wp-content/uploads/2020/04/7WS-Virtual-Courtroom-Protocol.pdf>

**“Unfairness to a party”**

6. The leading case on the meaning of “*unfairness to a party*” is *Antov v Bokan (No 2)* [2019] NSWCA 250. Of particular note in the context of the COVID-19 pandemic are the following points (at [50] to [51]):
- a. unfairness is a question of degree;
  - b. an assessment of unfairness is a broad evaluative judgment (see also at [46]); and
  - c. the availability of other options will be relevant to whether there is unfairness.
7. Given these matters, it appears that a consideration of whether there is “*unfairness to a party*” will be a similar exercise to determining whether the court should permit an AVL hearing in the exercise of its discretion.

**Exercise of discretion**

8. Austin J identified the following “*recurring themes*” in *ASIC v Rich* (2004) 49 ACSR 578 at [19]:

*... the appropriateness of audiovisual facilities for centrally important evidence, the assessment of credit where evidence is given by audiovisual link, difficulties raised by the use of documents for cross-examination in audiovisual evidence, technological difficulties due to lapse of time between transmission and receipt of questions and answers, and difficulties posed by the use of audiovisual facilities where the cross-examination is lengthy. There are also comments on the general approach to be taken by the court to a proposal for evidence to be adduced using audiovisual facilities.*

9. In the Federal Court, essentially the same considerations apply. Perhaps the most instructive case is *Kirby v Centro Properties Ltd* (2012) 288 ALR 601, in which Gordon J reviewed the cases and observed (at [11]):

*There is little to be gained by adding another or different gloss on the state of the authorities. In the end, each case will turn on its own facts and circumstances and the exercise of discretion as to what will best serve the administration of justice consistently with maintaining justice between the parties.*

### **COVID-19 authorities regarding AVL**

10. Before COVID-19, disputes concerning the use of AVL were typically concerned with one or more witnesses giving evidence by AVL, with a trial to be conducted in a courtroom in the conventional way. The typical COVID-19 scenario is different, the courts having adopted the default approach that final hearings are to be entirely by AVL. One expects that the risk of unfairness is elevated where the entire trial is to be conducted by AVL, but countervailing considerations will also be more powerful.
11. A number of authorities have considered AVL hearings in the context of the COVID-19 outbreak: *Quince v Quince* [2020] NSWSC 326; *Talent v Official Trustee in Bankruptcy (No 5)* [2020] ACTSC 64; *Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd* [2020] VSC 161; *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38; *Roach v Malsave Pty Ltd* [2020] NSWSC 364; *ASIC v GetSwift Limited* [2020] FCA 504 and *Capic v Ford Motor Company of Australia* [2020] FCA 486.
12. The last of these is the most striking. Perram J said (at [23]):

*If I could be sure that the crisis would have passed by October I would not hesitate to adjourn all the trials in my docket (save urgent cases) and then begin a process of relisting my entire docket from October 2020. The effect of that would be a postponement of six months with all cases being reallocated thereafter. However, there is simply no guarantee that the situation will be any better in six months' time. It*

*may be that this is a state of affairs which persists for a year or so. It is not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period. Nor is it healthy for the economy. A prolonged cessation of business will be a very poor outcome. Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be.*

### **Assessment of a witness's demeanour**

13. Litigants, or at least their counsel, often bemoan the impaired ability to assess witness's demeanour by AVL (e.g. *Quince v Quince* [2020] NSWSC 326 at [7] and [16]). The High Court has cautioned against credibility findings reliant upon an assessment of a witness's demeanour in the box (*Fox v Percy* (2003) 214 CLR 118 (Gleeson CJ, Gummow and Kirby JJ at [31])). There are many decisions where the courts have held that demeanour can be adequately assessed by AVL (*KN v R* (2017) 95 NSWLR 767; in the context of COVID-19 see *ASIC v GetSwift Ltd* [2020] FCA 504 at [33]).

### **The future**

14. Final hearings will be conducted by AVL for the foreseeable future. Technological problems should be addressed with a protocol. The courts' views on technological problems will be informed by matters including the individual judge's previous experiences with AVL hearings and the parties' sophistication and resources. There can be significant variation in the quality of AVL technology.
15. In NSW, "*unfairness to a party*" will be decided along lines similar to the exercise of discretion to permit an AVL trial. That will be a factual enquiry turning on the circumstances of each case.
16. The more recent authorities suggest a desire to proceed with AVL hearings wherever possible, in particular in larger cases.

## **Further information**

17. Members of 7 Wentworth Selborne continue to appear in virtual hearings in all settings (directions, mediations, interlocutory hearings, final hearings, and appeals) across a range of jurisdictions, and are familiar with all virtual hearing platforms, including telephone, Microsoft Teams, Cisco Webex, and Zoom.
18. We can assist in all necessary arrangements for virtual hearings and conferences, and are familiar with the many changes that have been made to court practices and protocols. We are also familiar with, and can advise upon, the many changes in law enacted across a range of practice areas in response to the COVID-19 pandemic.
19. For further information please contact our Clerk, Simon Walker on (02) 8224 3001 or [swalker@7thfloor.com.au](mailto:swalker@7thfloor.com.au).

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