A Timely Reminder about Making Arrangements for Video Evidence in Good Time

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In the recent case of *Andrew Evans v R&V Allgemeine Verischerung AG* [2022] EWHC 2436 (QB), the Court has given a timely reminder of the importance of making arrangements for witnesses to give evidence by video link well in advance of the trial.

The case itself concerned claims arising out of a road traffic accident in the Black Forest in Germany. The Claimant, a British national on a motorcycling holiday, collided with a driver who was insured by the Defendant. At issue was who was at fault in the collision.

As the relevant events took place in Germany and the Defendant is a German company, the Defendant's key fact witness (the insured driver, a Mr Gunther) and its expert on accident reconstruction, were based in Germany. On the first day of the trial, the Defendant applied for permission for Mr Gunther and the expert to give evidence by videoconference. The Claimant did not object in principle, though noted that the procedural requirements in Practice Direction 32 ("PD32") and a relevant practice note in the White Book had not been complied with.

PD32 relevantly provides:

"*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 in England or Wales by means of [videoconferencing].*"

It goes on to state that enquiries should be made of the Foreign and Commonwealth Office to ensure that the country from which the evidence is to be taken raises no objection to it at a diplomatic level.

The practice note at page 1171 of the White Book goes further, indicating that a party should have obtained any necessary permission from the relevant foreign court or authority to call a foreign witness remotely by the date of the pre-trial review.

Regrettably for the Defendant, the German government does not permit its citizens to give evidence remotely in foreign courts. Although the Defendant invited the Court to

disregard the objection of the German government, the Court refused to do so. Accordingly, a key witness of fact, and an expert witness, were not able to have their evidence tested by cross-examination at trial.

The knock-on effects of this can be seen in the judgment on the merits of the claim. HHJ Howells called this out specifically in respect of Mr Gunther, writing: "*I do not know why arrangements were not made for him to attend court in person*."

HHJ Howells ultimately determined that, although no adverse inferences should be drawn from Mr Gunther's non-attendance, where there was a direct conflict between the evidence of the Claimant (who gave evidence and whose evidence was tested by cross-examination) and the untested evidence of Mr Gunther, the evidence of the Claimant should be accepted. This meant that the Claimant's evidence in respect of key issues such as whether Mr Gunther had been driving on the wrong side of the road at the time of the collision was to be preferred; a matter which when determined in the Claimant's favour ultimately led to the Claimant succeeding in the claim.

In her judgment, HHJ Howells referred to the non-attendance at trial of Mr Gunther resulting from a "*brave assumption*" by the Defendant's solicitors that he would be permitted to give evidence by videoconference. There is a valuable lesson here for practitioners. Where a witness is based outside of the jurisdiction, it is crucial to make enquiries early on about whether they will be permitted to give evidence by videoconference. PD32 sets out the procedure to follow, and the sooner enquiries are made of the Foreign and Commonwealth Office, the better. In the present case, Mr Gunther was resident in Germany. Presumably with sufficient notice it would have been possible to arrange for him to travel to the UK so that he could give evidence. For key witnesses, making such arrangements may prove crucial in winning or losing a case.

The difficulties with witnesses and experts being based abroad were not the end of the criticism of the Defendant's solicitors. Problems with the translation of the Defendant's accident reconstruction expert's report led to further criticism of the Defendant's solicitors. Her Honour wrote:

> *Dr Weyde is a German expert engineer who speaks English to a very high level. He did not seek the assistance of an interpreter to give oral evidence. His report had originally been written in German and then been translated and was certified as correct. However at the commencement of his oral evidence he was keen to make the point that he did not accept that the translation was wholly correct. Over the course of perhaps an hour he went through in significant detail some minor and some more significant amendments to the translated versions. He said that he had provided these corrections to his instructing solicitors.*

The judgment goes on to note that this turn of events "was entirely unsatisfactory and caused delay in the conduct and progress of th[e] trial."

The lesson for practitioners here is clear: be prepared for trial. The Court does not look favourably upon delays caused by logistical matters that could easily be resolved well in advance of trial. A lack of preparation on the logistical front can have a real impact on the outcome of a case.

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