HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court has a very good understanding of the background facts and accordingly, while arguments must of course be put into proper factual context, there is no need for long, time-consuming recitations of the background facts.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

(All names in the fact pattern below are fictional).

Factual Background

1. Peter NIMBUS ("**Nimbus**") is a well-known Sanskrit scholar. His lectures are regularly published on YouTube to a large and enthusiastic audience around the world. Aside from his academic career, he is also a well-known professional model.

2. Despite his academic and general fame, Nimbus is well known for steadfastly refusing to be drawn into commenting on social and political issues in public.

3. However, from 2015, Nimbus has kept a private social media account, where he is a member of the "*Ancient Languages*" group ("**ALG**"). ALG is an invite-only network of leading Chair Professors around the world in the field of ancient languages.

4. Because members are scattered around the world and live under different political regimes, the "*About*" page on ALG makes clear that:

> "*All discussion here is **strictly private and confidential**. Attributing opinions published here to its author could lead to serious consequences for the Professor involved. Do not do so. Free discussion is crucial to academic discourse and please do not abuse the considerable privileges given to you.*
>
> *To prevent risk of hacking and unintentional leaking of information, and thereby ensure the confidentiality of everything discussed in the group, please use 2-factor-authentication on your mobile device and ensure that your browsing records on this application is automatically deleted after 24 hours.*"

5. Apart from posts published to the ALG as a whole, Nimbus also sometimes sends private messages to individual members of ALG, where he opines on political issues such as academic freedom and gender equality on campus.

6. Until the events described below, Nimbus knew all the members of ALG personally and these messages/opinions were never previously leaked to the public.

7. In 2019, Cyrus YING ("**Ying**") was appointed to the Chair of Latin at a university in Hong Kong. In 2020, he was invited, and joined, ALG on his social media account. Ying was the 31st member of the group. Nimbus did not know Ying personally.

8. In June 2021, a number of articles attributed to Nimbus were leaked to the newspapers ("**June Articles**").

9. The June Articles advocate for a number of positions on controversial political and social topics of the day. In terms of content, they are closely similar to three articles which (1) Nimbus had uploaded as posts to the ALG, and (2) Nimbus had sent by WhatsApp/private message to around 20-30 close colleagues and friends.

10. Polarised reactions emerged due to these articles, which were widely thought to represent Nimbus's private (and never before revealed) opinions. As a result of the mixed publicity they brought, Nimbus lost some modelling contracts (but gained some others).

11. After the leak, Nimbus suspected Ying because he was the most recent member to have joined the ALG (and the only ALG member Nimbus did not know personally). Ying had also earlier criticised Nimbus for "*dumbing down*" the study of ancient languages, which led to the two professors publishing a series of critiques of each other in academic journals.

12. Since the incident, no further members were admitted to the ALG, even though members continue to publish posts there irregularly.

13. To test his theory that Ying was the culprit, Nimbus posted a polemic on liberty and COVID-19 restrictions to ALG, but set its "*visibility*" to "*Cyrus YING only*" ("**Ying Only Post**") in July 2021. This had the effect that only Ying could see the post, even though Ying would fall under the impression that it was published to everyone on ALG. Ying liked and commented on the Ying Only Post.

14. In earlier private messages to friends (including friends from the ALG), Nimbus had expressed views *opposite* to those conveyed in the Ying Only Post.

15. Soon after, an article that is very similar to the Ying Only Post was leaked to the press and published ("**July Article**").

16. Nimbus concluded that the timing and content of the July Article showed that Ying must be the person behind the leaks leading to the June Articles and the July Article. He accordingly brought an action against Ying for breach of confidence in August 2021.

17. Ying denies playing any part in the publication of the June Articles and July Article. Ying's stance is that if Nimbus is in fact the victim of a breach of confidence, it must be someone else who is responsible. He accepts that he has read the Ying Only Post but denies taking any action other than liking and commenting on it.

18. By 15 December 2023, the case was set down for trial in June 2024.

19. The single issue on the agreed list of issue (signed by Solicitor Advocates for both P and D) was: "*whether the totality of the evidence is sufficient to prove that D provided information leading to the publication of (a) the June Articles and/or (b) the July Article*".

The Evidence by VCF Application

20. On 15 January 2024, Nimbus applied to give his evidence by VCF.

21. Ying opposed the application, arguing instead that the trial should be postponed if Nimbus is unable to attend in person.

22. Nimbus has filed 2 affirmations and Ying 1 affirmation in respect of the application.

The Assessment

Apart from the facts summarised above, the evidential material to be used consists of the following affirmations:

1. Affirmation and 2nd Affirmation of Peter NIMBUS
2. Affirmation of Cyrus YING

For this assessment, you should **not** refer to the materials for the Mini-Trial Assessment.

Apart from the positions canvassed in the affirmations, you have no instructions to accept any compromise that may be offered by the counterparty or the bench for an order or undertaking in different terms.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent in the hearing:

i. The Affirmations listed above
ii. The following case, a copy of which is attached:
    a. *Pacific Bulk Supramax Company Limited v Wong Man Kam Patrick* [2023] 4 HKLRD 152
iii. Hong Kong Civil Procedure (the Hong Kong White Book) 2024

HCA 1231/2021

Peter NIMBUS v Cyrus YING

Affirmation of Peter Nimbus

I, Peter Nimbus, of Scholars' Lodge, Quine University, New York, USA, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Plaintiff in this action. I make this affirmation in support of my application to give evidence by way of VCF in the trial of the captioned case.

2. I am advised that as a rule, Court hearings take place in person. I have visited Hong Kong before and when I commenced proceedings, I had intended to come to Hong Kong again to attend before the Honourable Court to give my evidence.

3. However, unfortunately, in November 2023, my wife Mary Nimbus ("**Mary**") was given a preliminary diagnosis for gastric cancer. After the preliminary diagnosis, she was immediately placed in hospital observation for further tests to be conducted.

4. Mary and I were shocked by this news. However, because the diagnosis was preliminary, and we did not wish to unduly worry our friends and family, we decided to keep Mary's condition private.

5. For this reason, I did not alert my solicitors to Mary's condition when the case was set down for trial in December 2023.

6. However, in January 2024, Mary's diagnosis was confirmed. She then commenced treatment immediately, and I am advised that her condition is likely to be unstable for the rest of 2024 (and potentially beyond), and that she has to stay in hospital for the foreseeable future.

7. In light of Mary's confirmed diagnosis, I have cancelled all my trips and lecturing tours, in order to stay in New York and look after her. Mary and I also felt that the point had come to let friends and family know of the illness, which we did in late January 2024.

8. I also decided around this time that I had no option but to contact my solicitors to ask if alternative arrangements can be made for me to attend the hearing of the captioned case.

9. I am advised and believe that the Honourable Court has a discretion to permit me to attend the hearing by VCF. My solicitors accordingly sought the Defendant's consent to the present Application. To date no reply was received.

10. Without limiting submissions to be advanced by my representative, I am advised the following factors support the exercise of the Honourable Court's discretion in my favour:-

    10.1. I am prevented from attending the hearing due to personal circumstances beyond my control, namely Mary's illness.

    10.2. Any prejudice to the Defendant will be minimal. The Defendant has not challenged (and has no basis to challenge) my credibility as a witness, or that I am the victim of a breach of confidence.

    10.3. The only issue before the Honourable Court is whether it is the Defendant (or someone else) who is responsible for the breach of confidence, which is an issue primarily (if not solely) turning on the Defendant's evidence, and on the inferences to be drawn from that evidence.

11. In the premises, I pray the Honourable Court to grant my application.

HCA 1231/2021

Peter NIMBUS v Cyrus YING

Affirmation of Cyrus Ying

I, Cyrus Ying, of Poet's Quarters, Clear Water Bay University, Hong Kong, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Defendant in this action.

2. While I have great sympathy for Mary and the Plaintiff, I am advised and believe that it would not be fair for the Plaintiff's evidence to be given by VCF in the present case.

3. Without limiting submissions to be advanced by my Solicitor Advocate, I would like to draw the Honourable Court's attention to the following points:-

    3.1. **First**, the Plaintiff seems to be suggesting that his evidence is accepted or will not be challenged at trial. This is simply untrue.

    3.2. I am advised and believe that at trial, my Solicitor Advocate will be duty bound to test the Plaintiff's evidence. The culprit behind the alleged breach of confidence suffered by the Plaintiff may include other members of ALG; his other friends and colleagues; or third-party hackers who accessed his phone or computer without his permission. Indeed for all I know, the Plaintiff himself could have provided the materials to journalists in order to garner the attention he seems to crave. None of these possibilities can be ruled out without thorough examination (including cross-examination) of the Plaintiff.

    3.3. I am advised and believe that, if permitted to give evidence by VCF, my Solicitor Advocate will be placed in considerable forensic disadvantage as he would not be able to see the Plaintiff's immediate reactions in person in the courtroom. Nor would the Honourable Judge hearing the case.

3.4. **Second**, while I have great sympathy for the challenging personal circumstances faced by Mary and the Plaintiff, there is no suggestion that the Plaintiff's presence in New York is necessary for Mary's well-being.

3.5. Mary is staying in hospital and is doubtless in the care of its staff. With the current state of technology, there cannot be any difficulty for the Plaintiff to keep in touch with Mary by phone or video conferencing; in fact, it is a common experience for families and partners to do so during the COVID-19 pandemic.

3.6. **Third**, as the Plaintiff apparently accepts, the Application is made very late. In fact, by the time the case was set down for trial, the Plaintiff was already aware of Mary's condition.

3.7. While I respect the Plaintiff and Mary's wish to protect their privacy, it was the Plaintiff's choice not to inform his lawyers of Mary's condition when the case was set down for trial, when the situation could have been drawn to the Court's attention and appropriate directions could have been made.

3.8. **Fourthly**, if Mary's condition is likely to be unstable in 2024, subject to the Honourable Court's discretion, I would not oppose the vacation of the current trial date.

4. In the event that the Honourable Court is minded to order evidence by VCF for the Plaintiff, I am advised and believe that leave should be given for me to give evidence by VCF too. Such a direction would ensure both parties are on an equal footing as regards the forensic disadvantages in respect of evidence by VCF.

5. In the premises, I pray the Honourable Court to dismiss the Plaintiff's application.

HCA 1231/2021

Peter NIMBUS v Cyrus YING

2nd Affirmation of Peter Nimbus

I, Peter Nimbus, of Scholars' Lodge, Quine University, New York, USA, do solemnly, sincerely and truthfully affirm and say as follows:-

1. I am the Plaintiff in this action.

2. I make this Affirmation in reply to the Affirmation of Cyrus Ying.

3. My solicitors and I have seriously considered the Defendant's suggestion (made for the first time in the Affirmation of Cyrus Ying) that the trial date be vacated pending clarity on Mary's health condition.

4. I am advised and believe that the Defendant's suggestion is not conducive to the fair resolution of the issues in this case.

5. Unfortunately, as of today, there is still no clarity as to when (if at all) Mary's condition will improve or stabilise. I am advised by Mary's doctors that there likely won't be any greater clarity in the near future.

6. The Defendant's suggestion would in effect result in an indefinite postponement of the trial, which would not be conducive to the fair resolution of the issue in dispute.

7. In the premises, I pray the Honourable Court to grant my application.

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12-point font, single spaced).

You may refer to the attached case authority as you think appropriate (and do not need to attach it to the skeleton; the Judge will have a copy of the case at the hearing). You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authority and the White Book.

You must email your skeleton argument in MS Word format to the Secretariat to the Higher Rights Assessment Board at info@hrab.org.hk **by no later than 3:00pm of the Wednesday prior to the day of the assessment**. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. If you submit your skeleton late, it may not be marked and will place you at risk of failing the assessment.

THE CONDUCT of the Interim Application

You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

i. No reply submissions will be conducted.

ii. You should be prepared to deal with judicial interventions and questions in relation to your submissions.

iii. You should be prepared to address the court on the issues of costs and/or consequential orders as a matter of principle.

Pacific Bulk Supramax Co Ltd

and

Wong Man Kam Patrick

[2023] HKCFI 1973

(Court of First Instance)

(Miscellaneous Proceedings No 1632 of 2021)

Queeny Au-Yeung J in Chambers

18, 31 July 2023

Civil procedure — trial — video conferencing facilities — alleged contemnor in contempt proceedings unfit for travel — application for leave to give evidence at trial by video conferencing facilities — principles — whether use of VCF appropriate in circumstances — available options considered

Civil evidence — witness — testimony — video conferencing — application for leave to give evidence at trial by video conferencing facilities — principles

民事訴訟程序 — 審訊 — 視像會議設施 — 於藐視法庭法律程序中被指控的藐視法庭者不良於行 — 申請許可通過視像會議在審訊中作供 — 法律原則 — 使用視像會議設施在該情況下是否合適 — 考慮可用的選項

民事證據 — 證人 — 證供 — 視像會議 — 申請許可通過視像會議在審訊中作供 — 法律原則

Shortly before the commencement of the trial of a set of contempt of court proceedings, D1 faced a medical emergency that would make him unfit for travel. Ds applied: (i) for leave to D1 to give evidence at the trial by video conferencing facilities (VCF); (ii) as a fallback position, to adjourn the trial part-heard to enable D1 to give evidence; and (iii) as a last resort, for the trial to be re-fixed.

Held, ordering the trial to be refixed, and that costs arising from the adjournment be paid by Ds to P, that:

Legal principles in relation to VCF applications

(1) Whether to make an order permitting a party to give evidence by VCF was a question of case management. The general relevant factors included that: (i) the giving of evidence by VCF was an exception; (ii) the starting point was that proceedings were conducted in court, (iii) sound reason was required to justify a departure; (iv) the solemnity of court

proceedings and its atmosphere was highly important in the taking of evidence; (v) the court might be more disposed to allow evidence by VCF for technical or purely factual evidence; (vi) it was important for witnesses to be examined under the solemn atmosphere of the court where credibility was seriously contested; (vii) costs and convenience might be important considerations; and (viii) it was a matter of judgment of the court choosing the best course to achieve a just result by taking into account all the material considerations, including whether the witness was capable of attending the proceedings, prejudice to the other party, the Underlying Objectives, delay to the proceedings, and availability of the facilities (see Practice Direction 29) (*Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822, *Re Nobility School Ltd* [2020] HKCFI 891 applied). (See paras.6–7.)

(2) The court should not lose sight of the actual situation and the advancement in technologies. Since the outbreak of COVID-19, courts had heard and tried cases through VCF with no compromise to the quality of justice (*Seto Sha Li v Lai Jin Tong* [2021] HKCFI 3561 applied). (See para.8.)

(3) Where the party or witness would give important or crucial evidence, and refusing the VCF application would stifle the applicant's claim/defence, this was a factor in favour of granting the application (*Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822 applied; *CTRISKS Rating Ltd v Chan Pik Kwan* [2021] HKCFI 2619 considered). (See para.9.)

(4) Potential injustice could be created where the witnesses gave evidence by VCF since the court and the examiner might be deprived of the chance to observe the witnesses' immediate reaction due to interruptions of signal transmission, and the witnesses might be given more time to think about their answers (*Esports Business Development Ltd v Wong Chun Yee Christopher* [2022] HKCFI 2627 applied). (See para.10.)

(5) Factors to be considered in applications to postpone a trial (a milestone date) due to the unavailability of witnesses were set out in *Arko Ship Leasing* (*Arko Ship Leasing Ltd v Winsmart International Shipping Ltd* [2013] 2 HKLRD 121 at [14] considered). (See para.11.)

(6) Where a party or a necessary and important witness was prevented by illness from attending the trial and the judge was satisfied of the fact of his or her illness, the materiality and importance of his or her evidence and that the granting of an adjournment would not cause an injustice to the other party which could not be reduced by costs, it was the duty of the judge to grant an adjournment. The applicant for an adjournment had the onus to prove such need (*Law Yin Pok*

Bosco v Chan Yee Shing (HCMP 2256/2012, [2013] HKEC 132) applied; *Daimler AG v Leiduck (No 2)* [2013] 2 HKLRD 822 considered). (See paras.12, 13.)

(7) When applying these principles, the court should bear in mind the nature of the proceedings and that any decision should aim at achieving the ends of justice. (See para.14.)

Consideration of available options

(8) Giving evidence using VCF was not appropriate for this case. There was no better example of a proceeding which called for the physical attendance of witnesses to be examined under the solemn atmosphere of the court than contempt proceedings, which sought to punish disobedience to the court, particularly since D1 was the alleged contemnor. D1's credibility would be seriously challenged. It was also inappropriate to adjourn the trial part-heard, which would make it more difficult for the judge and the parties to approach the case coherently, causing more prejudice to P than D1 since P had to prove the case beyond reasonable doubt. There was also no point hearing D2 before D1 since D1 was the main witness. Refixing the trial was the best option. D1 would be available to testify in two months' time to give evidence physically in Hong Kong (*Esports Business Development Ltd v Wong Chun Yee Christopher* [2022] HKCFI 2627 applied). (See paras.16–27.)

Application

This was the application by the defendants for leave to the first defendant to give evidence at a trial for contempt of court by video conferencing facilities, or to adjourn the trial part-heard, or to re-fix the trial.

Mr Christopher Chain SC and Mr Arthur Poon, instructed by Lau, Horton & Wise LLP, for the plaintiff.

Mr Nicholas Oh, instructed by Ho & Ip, for the 1st and 2nd defendants.

Cases cited in the judgment

Arko Ship Leasing Ltd v Winsmart International Shipping Ltd [2013] 2 HKLRD 121

CTRISKS Rating Ltd v Chan Pik Kwan [2021] HKCFI 2619, [2021] HKEC 3950

Daimler AG v Leiduck (No 2) [2013] 2 HKLRD 822, [2013] 5 HKC 170

Elijah Saatori v Raffles Medical Group (Hong Kong) Ltd (HCMP 3224/2016, [2017] HKEC 1982)

Esports Business Development Ltd v Wong Chun Yee Christopher [2022] HKCFI 2627, [2022] HKEC 3451
Lam Hon Keung Keith v Lam Chi Tat Anthony [2021] HKCFI 1282, [2021] HKEC 1990
Law Yin Pok Bosco v Chan Yee Shing (HCMP 2256/2012, [2013] HKEC 132)
Seto Sha Li v Lai Jin Tong [2021] HKCFI 3561, [2021] HKEC 5459
Tsang Woon Ming v Lai Ka Lim; sub nom Re Nobility School Ltd [2020] HKCFI 891, [2020] HKEC 917

Other material mentioned in the judgment
Hong Kong Judiciary, Practice Directions, PD 29 (Use of The Technology Court)

REASONS FOR DECISION AND SUMMARY ASSESSMENT OF COSTS

Queeny Au-Yeung J

A. Introduction

1. The plaintiff (**PB**) applies to commit the defendants ("**Wong**" and "**Leung**" respectively) for contempt of Court. The trial was set down to commence on 26 July 2023 with 6 days reserved.

2. Wong was only advised on 14 June 2023 that the surgery would lead to his being unfit to fly for 2 months. By then his surgery had already been rescheduled to 28 June.

3. In view of the fairly detailed medical evidence produced by Wong, the plaintiff has fairly accepted that the medical emergency was not entirely within the defendants' control.

4. The defendants lost no time in coming to Court for this application:

(1) For leave to Wong to give evidence at the trial by video conferencing facilities (**VCF**) due to the fact of Wong's unfitness to travel;
(2) As a fallback position, to have the trial proceed as scheduled but adjourned part-heard after all other witnesses have testified and for a further 3 days to be fixed for Wong to give evidence and for closing submission; or
(3) As a last resort, for the trial to be vacated and re-fixed in consultation with counsel's diaries with 6 days reserved.

5. After hearing the parties, I chose the 3rd option. I also ordered that costs arising from the adjournment be paid by the defendants to PB. Here are my reasons.

B. Legal principles in relation to VCF applications

6. The question of whether or not to make an order permitting a party to give his evidence by VCF is a question of case management: see *Daimler AG v Leiduck* [2013] 2 HKLRD 822, [11], CA.

7. The general factors relevant to an application to give evidence by VCF have been set out in the oft-cited case *Re Nobility School Ltd* [2020] HKCFI 891, [9], Anthony Chan J:

(1) The giving of evidence by video conferencing facilities ('VCF') is an exception;
(2) The starting point is that proceedings are conducted in court. I would add that this is more important when it comes to a trial;
(3) Sound reason is required to justify a departure from the starting point;
(4) The solemnity of court proceedings and its atmosphere is highly important in the taking of evidence;
(5) The court may be more disposed to exercise its discretion to allow evidence by VCF in respect of technical or purely factual evidence which involves no serious issue on credibility or relatively unimportant evidence;
(6) Where the credibility of the witness is seriously contested, it is important for the witness to be examined under the solemn atmosphere of the court;
(7) Costs and convenience may be important considerations which the court will have to weigh in the determination of the application;
(8) Ultimately, it is a matter of judgment of the court choosing the course best calculated to achieve a just result by taking into account all the material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, the Underlying Objectives, any delay to the proceedings and practical considerations like the availability of the facilities (see Practice Direction 29).

8. Whilst paying regard to the solemnity of court proceedings and the Court's atmosphere in the taking of evidence, the court should, at the same time, not lose sight of the actual situation and the advancement in technologies. Since the outbreak of COVID-19 in the beginning of 2020, courts in this jurisdiction has heard and tried cases through VCF with no compromise to the quality of justice. *Seto Sha Li v Lai Jin Tong* [2021] HKCFI 3561, [4], Recorder William Wong SC.

9. Where the party or witness gives important or crucial evidence, and refusing the VCF application would stifle the applicant's claim/defence, this is in fact a factor in favour of granting a VCF application: see *Leiduck*, [23]. *CTRISKS Rating Ltd v Chan Pik Kwan* [2021] HKCFI 2619 was a case involving serious allegations of breach of contractual and fiduciary duties. Anthony Chan J granted a VCF application made 11 days before trial, where 2 key witnesses (whose evidence was seriously contested) who went on a business trip to the UK had their plan to attend the trial undermined by heightened COVID-19 restrictions. It was said at [7] that having the trial adjourned was "highly undesirable for obvious reasons".

10. However, in *Esports Business Development Ltd v Wong Chun Yee Christopher* [2022] HKCFI 2627 at [25]–[26], DHCJ H Au Yeung: highlighted the potential of creating injustice in forum of the witness who gives evidence by VCF:

> [25] … the usage of VCF may be an advantage to the witness, because any problem in the internet connection (which may arise at any time and from time to time) may interrupt the transmission of the video signal. The screen may be 'freezed' during the cross-examination as a result. The questions or answers asked/given may be 'lost' in the process. This may deprive the Court and the examiner the chance to observe the immediate reaction of the witness when certain questions are asked. Such sudden loss of signal may also lead to suspension of the Court proceedings, and this in turn may give the witness a longer time to think about his/her answer to the question just asked by the examiner. If the witness alleges that he/she cannot hear a question clearly, it is also very difficult if not impossible to verify whether such an assertion is real, and whether he/she is just buying time to figure out what to say in response to a question.
>
> [26] Furthermore, giving evidence at any place other than the Court room would also tend to reduce the formality of the Court proceedings. This will create an injustice situation in favour of the witness who gives evidence by VCF. (underline added)

11. Closely related are applications to postpone a trial (a milestone date) due to the unavailability of witnesses. The factors to be considered have been set out *Arko Ship Leasing Ltd v Winsmart International Shipping Ltd* [2013] 2 HKLRD 121 at [14], as *per* G Lam J (as he then was):

(1) What is the nature of the proceedings? What is at stake to the parties, in particular to the [parties] who seek the adjournment?
(2) Would the relevant witnesses definitely not be available to give evidence in any manner — for example, if a witness is unable to come to Hong Kong, is it possible nevertheless to receive his evidence via videolink?
(3) What is the nature of the difficulty preventing the witnesses from attending, and is the applicant responsible for creating that difficulty and if so to what extent?
(4) What is the nature of the evidence each relevant witness is intended to be called to give? Is he the only possible source of such evidence?
(5) Has the party seeking the adjournment made efforts to locate other persons who may be able to stand in to give similar evidence?
(6) Will the adjournment be likely to address the problem faced by the applicant?
(7) What is the risk of prejudice or other disadvantage to other parties if the adjournment is granted?
(8) The application must also be viewed in terms of the wider implications on the administration of justice. In particular, I have in mind the public interest in the efficient despatch of the court's business.

12. Where a party or a necessary and important witness is prevented by illness from attending the trial and the judge is satisfied of the fact of his illness, the materiality and importance of his evidence and that the granting of an adjournment will not cause an injustice to the other party which cannot be reduced by costs, it is the duty of the judge to grant an adjournment. It may be on terms, and failure on his part to do so constitutes a miscarriage of justice. The onus is on the applicant for an adjournment to prove the need for such an adjournment. See *Law Yin Pok Bosco v Dr Chan Yee Shing* (HCMP 2256/2012, [2013] HKEC 132, 2 November 2012), [9] and [11], as *per* Fok JA (as he then was).

13. In *Leiduck*, [19]–[21], one of the factors leading to the Court of Appeal granting the VCF application was that the "uncontradicted medical evidence is to the effect that it would be life-threatening for the 1st defendant to have to travel to Hong Kong".

14. When applying these principles, the Court should bear in mind the nature of the proceedings before it and bear in mind that any decision should aim at achieving the ends of justice.

B1. Option 1 — Wong to give evidence by VCF

15. The defendants submitted that there would be little to no prejudice to PB because:

(1) Technological advances and judicial experience have caused judges and counsel to be just as effective in cross-examining witnesses via VCF without compromise to the quality of justice;
(2) Any concerns about the integrity of Wong's evidence could be dealt with by having PB's legal representatives in London present at the venue. There was no apparent risk of improper corroboration or tailoring of the evidence of the defence witnesses as the only 2 witnesses would be Wong and Leung themselves; and
(3) PB indicated that they would unilaterally engage live transcription services so it would have access to transcripts of Wong's oral evidence.

16. In my view, contempt proceedings, though civil in nature, seeks to punish disobedience to the Court and not a party. There is no better example of a proceeding which calls for the physical attendance of witnesses to be examined under the solemn atmosphere of the court. It is all the more so since Wong is not just a witness but the alleged contemnor. His evidence is adopted by Leung, the other alleged contemnor. It will not be an exaggeration to say that the Court's findings on credibility of Wong would have a direct bearing on Leung's liability as well.

17. In this case, PB alleges that Wong and Leung have knowingly put forth multiple false undertakings based on false premises to the Court in the prior underlying proceedings in HCMP 1190/2020. Accordingly, it would be the subjective knowledge, intention and motive of Wong that would bear heavy weight in fixing his liability. Mr Chain SC and Mr Poon, counsel for PB, indicated that the honesty and credibility of Wong would be seriously challenged by way of cross-examination at the trial, which was expected to last for no less than one full day. The words of DHCJ H Au-Yeung in *Esports Business* are particularly apt in the present case.

18. The above facts also distinguished this case from the authorities cited above, which did not involve contempt proceedings and there was no allegation of fraud or dishonesty against the applicant for a hearing with VCF.

19. The suggested venue of International Dispute Resolution Centre in London could not replicate the solemnity of the Court environment, in the context of contempt proceedings. The other

technical measures referred to in [15(2)] and [15(3)] above could not allay the concerns of the Court, as expressed in *Esports Business*.

20. Accordingly, giving evidence using VCF was not appropriate for this case. Wong has to attend court at the trial.

B2. Option 2 — adjournment of the trial part-heard

21. The defendants' good intentions of not wasting the Court's time and costs of the parties were well appreciated. However, it was most undesirable to adjourn the trial part-heard in this case for the following reasons.

22. The trial judge was on temporary appointment and is a senior counsel in active practice. It may create difficulty in refixing the second part of the trial in consultation with his and the 2 trial counsel's diaries.

23. A part-heard trial would make it more difficult for the judge and the parties to approach the case coherently. Having live transcription records would only aid in memory of the evidence but not the impression of the performance of the witnesses in the box to enable the Court to assess their overall credibility. PB would suffer greater prejudice than Wong because PB had to prove the case beyond reasonable doubt.

24. Wong was to be the main witness. There was no point hearing Leung before him, as Leung's main defence was in Wong's affirmations.

25. Given the importance of Wong's credibility and honesty in this case, having an adjournment after other witnesses have given evidence may enhance the risk of witness' tailoring of evidence.

26. For the reasons given, I did not consider it appropriate to adjourn the trial part-heard.

B3. Option 3 — refixing trial

27. This was by far the best option. The adjournment would not be open-ended, as had happened in other cases during the pandemic. Wong would be available to testify in 2 months' time to give evidence physically in Hong Kong. I therefore directed that the trial be refixed to no earlier than 1 September 2023 to cater for Wong's need for recuperation and inability to fly to Hong Kong.

C. Costs

28. The general principle is for the costs thrown away to be borne by the party who brought about the adjournment of the trial: *Elijah Saatori v Raffles Medical Group (Hong Kong) Ltd*, (HCMP 3224/2016, [2017] HKEC 1982, 13 September 2017), [45], Chu JA (as she then was).

29. That would be the case even though the adjournment was not due to the "fault" of the applicant. In *Lam Hon Keung Keith v Lam Chi Tat Anthony* [2021] HKCFI 1282, [15]–[16], the adjournment arose out of the death of the plaintiff, the primary witness who filed various witness statements in support of the plaintiff's case. Wilson Chan J nevertheless ordered costs in favour of the defendant.

30. As the adjournment of this case arose entirely out of the needs of Wong, although it was not his "fault" as such, the defendants should bear the costs thrown away.

31. In respect of costs for the summons, there was no justification for 2 fee earners. Further, without disrespect, "considering issues/strategy & internal meetings" and preparation of statement of costs cannot be charged on party-and-party basis. I summarily assess costs at $50,000.

32. In respect of costs thrown away as a result of the adjournment, post-hearing, this Court was informed that the new hearing dates have been fixed to start on 6 June 2024 to cater for the diary of the defendants' senior counsel. Whilst more time is needed to prepare for the trial than would have been the case with a shorter adjournment, I am not minded to grant the brief fees as part of the costs thrown away. This is because openings are in written form; and authorities can be re-used at the new trial dates. I would grant costs thrown away on the basis of a day's refresher for two counsel. Once again there are non-chargeable items like preparation of statement of costs. I summarily assess costs thrown away at $92,000.

33. I thank counsel for their assistance.

Reported by Chelsea Ma

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini-trial conducted at the assessment, only one witness for each party will actually be physically present for examination purposes.

The Issue at Trial

Peter Nimbus's application for evidence by VCF was dismissed. The trial will take place as scheduled, with Nimbus flying to Hong Kong to give evidence in person.

This is the trial of Nimbus's claim in the tort of breach of confidence against Ying.

Parties agree that the issue at trial is:-

> "*Whether the totality of the evidence is sufficient to prove that D provided information leading to the publication of (a) the June Articles and/or (b) the July Article*".

Report of the Joint Expert

Parties have agreed for the Report of the Joint Expert (Dr Samantha Chadha) to be admitted, without the expert attending the hearing of the Trial. You may refer to this Report for the purpose of this assessment.

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini-trial on the day of the assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Peter Nimbus, the Plaintiff

2. Hayley Wan, Chair of Aramaic at Quine University and member of ALG

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Defendant:

1. Cyrus Ying, the Defendant

2. Celia Yeung, Chair of Greek at Quine University and member of ALG

You can assume:

i. the witnesses will give evidence at trial in the order listed above.

ii. the witnesses who will not appear "live" at the mini-trial will have given/will give evidence in terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Further, you can assume that the Judge/Assessor's finding on the interim application does not affect the evidence available for the purpose of the trial.

However, for the avoidance of doubt, you may make use of the instructions and the Affirmations for the interim application for the purpose of this exercise.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give "live" oral evidence at trial on behalf of your client. You should conduct a full examination in chief of the witness on the basis that his/her statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending the trial to give "live" oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness's statement does not stand as evidence in chief

- deal with any intervention made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of the witnesses by the advocate representing the opposing party

- deal with any judicial interventions and questions as and when they arise