



Virtual cross-examination: a bridge too far in a brave new world?

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Even in the pre-COVID world, the cross-border nature of complex commercial litigation in Jersey and around the world often meant that plaintiffs, claimants, assets, and – crucially – witnesses, could be located in different jurisdictions.

Following the enactment of emergency COVID legislation in Jersey some months ago¹, our judiciary introduced various measures to ensure that the administration of justice would continue in a timely and robust way². In some ways, this has catalysed a shift towards normalising virtual hearings.

However, one area where courts are understandably less eager to embrace technology is cross-examinations. As a general principle of fairness, real-time, face-to-face cross examination is a valuable way to test evidence because a witnesses' body language can form a crucial part of a judge's assessment of how truthful or reliable a witness really is – and some disputes will turn on such issues more than others³. This particular issue was recently considered by the Royal Court in *Trico Ltd v Buckingham*, which will be considered in more depth in this briefing note⁴.

Legal position

In Jersey, it is possible for cross-examination to be done via videolink (or equivalent means where parties can communicate without physically appearing in court). This may be ordered under the Royal Court Rules or under the court's inherent jurisdiction⁵. This can be attractive for logistical ease, such as where a witness cannot easily travel to Jersey through

no fault of their own, and to avoid rescheduling trial dates⁶. However, this is 'not yet a mere optional alternative': virtual cross-examination should only be permitted for 'good reason' where doing so would be in the interests of justice. This is something that has to be assessed broadly based on the particular facts of each case⁷.

Trico: a case study

The *Trico* decision is a good illustration of how this might look in practice: there, two witnesses, the defendant and his partner, had asked to be cross-examined virtually. Permission was granted in one case but refused in the other⁸.

The defendant had asked for virtual cross-examination as he was older. In light of the ongoing COVID pandemic, he might be more vulnerable to the disease (and therefore wished to minimise having to leave his home). However, no medical evidence had been provided in support of this, and the judge considered that he was a key witness. Further, 'credibility and major differences in recollection' were at the heart of the dispute so it would be unfair if only the plaintiff's key witness could be cross-examined in person, while the defendant was cross-examined virtually. Permission was therefore refused⁹.

In contrast, permission was granted for the defendant's partner to be cross-examined virtually. Given the ongoing COVID pandemic, her childcare responsibilities, and the fact that the evidence she was to give was relatively short and related to one self-contained issue, the judge thought it was

¹ Covid-19 (Enabling Provisions) (Jersey) Law 2020; Covid-19 (Emergency Powers – Courts) (Jersey) Regulations 2020.

² See, for example, RC20/05, Guide for the attestation of documents for probate and the execution of wills under the Covid-19 (Signing of Instruments) (Jersey) Regulations 2020.

³ *Ithaca (Custodians) Ltd v Perry Corp* [2003] 2 NZLR 216, [211].

⁴ *Trico Ltd v Buckingham* [2020] JRC 106.

⁵ Royal Court Rules 2004, rule 6/20(2)(c); *Brazil v Durant* [2012] (1) JLR 31, [13]–[14].

⁶ *McCann v Bateman* [2005] JRC 027B, [8].

⁷ *Brazil v Durant* [2012] (1) JLR 31, [4]; *McCann v Bateman* [2005] JRC 027B, [7]; *Polanski v Condé Nast Publication Ltd* [2003] EWCA Civ 1573, [9].

⁸ *Trico Ltd v Buckingham* [2020] JRC 106, [43], [45].

⁹ *Trico Ltd v Buckingham* [2020] JRC 106, [44], [45].

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appropriate for permission to be granted¹⁰.

Implications

While courts can and should look at requests for virtual cross-examination in the round, there are certain key factors that would affect the success of such applications:

- The relative importance of that witness' evidence to the case as a whole – a court would be less willing to accept the virtual cross-examination of a key witness
- The extent to which a witness' evidence needs to be tested against that of other witnesses. This depends on whether or not credibility or accuracy issues are at stake, for example
- Relative fairness between the parties – all key witnesses should be treated similarly, if possible
- The personal circumstances of a witness, such as health issues or their other responsibilities

This is not a closed list, and other factors, like practical convenience, have been identified elsewhere¹¹. On one hand, there is nothing inherently unfair about virtual cross-examinations, the tools exist to carry out virtual cross-examination effectively and the court should make use of technology where beneficial¹². On the other, this can prove to be an additional layer of complexity logistically, and technology cannot perfectly replicate a face-to-face cross-examination, such as due to the risk of technological glitches¹³. A judge would therefore have to weigh up all the relevant factors carefully before making a decision. It must also be noted that the analysis would be different if all parties consent to an entirely virtual trial.

Conclusion

While it is clear that there is merit in face-to-face cross-examination, the courts in Jersey are aware of the difficulties that some witnesses might face in appearing in person. Virtual cross-examinations are unlikely to become the norm in the near future. However, necessity is the mother of invention and the COVID pandemic has underscored how virtual cross-examinations can and should be allowed in suitable circumstances.

Looking ahead, as technology continues to improve, it would be plausible that there will be an increase in virtual cross-examinations in cross-border litigation generally. Accordingly, while a total shift to virtual cross-examinations would probably be a bridge too far, it is entirely possible to meet mid-Channel and act pragmatically in balancing different factors to uphold justice while accommodating the personal circumstances of witnesses as required.



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¹⁰ *Trico Ltd v Buckingham* [2020] JRC 106, [43].

¹¹ See, for example, *McCann v Bateman* [2005] JRC 027B, [8].

¹² *Brazil v Durant* [2012] (1) JLR 31, [21].

¹³ *Brazil v Durant* [2012] (1) JLR 31, [23].