Introduction and background

1. During April 2020 the Federal Court of Australia (*per* Perram, J) was required to deal with an application for the adjournment of a trial (**the trial**) by the respondent, i.e. the Ford Motor Company of Australia Limited (**Ford**).[1]

2. The trial was due to commence 15 June 2020[2] for a period of six weeks during which up to fifty (50) witnesses[3] could be called for the applicant, Ms Biljana Capic (**Capic**). The action – a class action about allegedly defective gear boxes[4] – was instituted in 2016 and had already been set down for hearing on two previous occasions.[5]

3. Ford contended that the trial ought not to proceed on 15 June 2020 and should instead be set down for trial later in the year, perhaps in October. In support of this contention it relied on the need to ensure a safe system of work for practitioners and witnesses, increasing restrictions on movement and gatherings, and the realistic limits of technology. Capic countered by submitting that the available technology is such that the trial could realistically proceed.[6]

Overarching considerations

4. Before the court engaged the parties' aforesaid competing contentions – and especially the difficulties raised by Ford in its submissions, which the court described as '*substantial*'[7] – it considered:

    4.1. *First*, the statutorily imposed obligation '*to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible*'[8] and proceeded to remark that:

> 'The requirement that proceedings be conducted according to law is inflexible but the exhortations to speed, thrift and efficiency are subject to the rider that this be achieved so far as '*possible*''

    4.2. *Second, the health risk posed to practitioners, witnesses, court and transcript* staff, and the judge himself, adding that there were two aspects to the health risk, namely (i) that of *spreading the virus* and (ii) that of *contracting the virus*. In this regard, the court stated that:[9]

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1 Para 1 of the case report at https://jade.io/article/725605.

2 *Ibid*.

3 *Id*., at para 18 this thereof.

4 *Id*., at para 16 thereof.

5 *Id*., at para 1 thereof.

6 *Ibid*.

7 *Id*., at para 8 thereof.

8 *Id*., at para 2 thereof, including the quotation that follows. The local Superior Courts Act, 10 of 2013 does not contain a similar provision, but in terms of section 8 (3) thereof the Chief Justice may issue written protocols or directives, or give guidance or advice, to judicial officers in respect of norms and standards for the performance of the judicial functions. In this regard, the Chief Justice has issued such a protocol in Government Notice No 147 of 28 February 2014, as published in Government Gazette No. 37390 of the same date, entitled '*Norms and standards for the performance of judicial functions'*. Para 5.1 (ii) of these norms and standards establishes a '*norm*' which provides: '*Every Judicial Officer must dispose of his or her cases efficiently, effectively and expeditiously*', while para 5.2.1 (i) thereof establishes a '*standard*' which provides: '*Judicial Officers shall at all times strive to deliver quality justice as expeditiously as possible in all cases*'. However, more importantly in the sphere of arbitral disputes, which we primarily are concerned with, the Association of Arbitrators' *Rules for the Conduct of Arbitrations: 2018 Edition* (*1 January 2018*) provide as follows in Article 17.1 that: '*The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*.'

9 *Id*., at para 3 thereof, including both quotations that follow.

> 'It is imperative that this Court's orders not result in a situation where these risks are increased. At the moment movement is restricted in New South Wales and Victoria by measures under State law: [*references to the laws cited are omitted*] …'

and later proceeded as follows:

> 'It is plain these must be observed and to the extent that there is any doubt about their application to persons engaged in litigation in federal jurisdiction, I direct the parties and the representatives at all times to comply with the relevant health and public order regulations.'

The primary question

5. After noting that the above two considerations, as well as the trajectory of the disease both in Australia and overseas, suggest '… *a mode of trial conducted over virtual platforms from participants' homes*', the court raised the following fundamental question:[10]

> 'The **question then is whether** … [*reference to the Australian statute omitted*] … **and considerations of fairness to the parties mean that a virtual solution**—which is the only viable solution—**is not feasible and that the trial must be postponed**.' (Emphasis added).

6. The court immediately acknowledged that not every case can be heard over a virtual platform[11] and – stating the obvious – remarked that: '*There will be many cases for which such a mode of trial will not be feasible. For example, I doubt that a fair trial can be had where an applicant does not speak in English and is in immigration detention*'.

The nature of Ford's technical objections and the court's conclusions

7. The court next engaged Ford's submissions against a hearing over a virtual platform by categorising its objections under the following seven (7) rubrics: (i) technological limitations; (ii) physical separation of legal teams; (iii) expert witnesses; (iv) lay witnesses, and in particular cross-examination; (v) document management; (vi) future issues; and (vii) trial length and expense. It then dealt with each one of them.

(a) <u>Technological limitations:</u>

8. Under the first rubric – *technological limitations* – the court dealt with Ford's core objection, being the problem of internet connections and other possible technological limitations, such as access to hardware and software, as follows:

   8.1. The court acknowledged that some participants were likely to have excellent Internet connections and others with connections that were not so good. After relating to a recent experience the judge had in a six-day trial run on a virtual platform involving a break in the taking of evidence due to a bad Internet connection the court stated that '… *by and large the experience was that* ***although intermittent internet connections were tiresome, they were not insurmountable***'[12] (Emphasis added).

   8.2. The court also considered that a solution to the Internet connection issues raised by Ford would be to pause the hearing until better connections could be established but stated that it did not view this as justifying the trial from not proceeding.[13] The court then added:[14]

> 'A certain fluidity in the order in which witnesses give their evidence

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10 *Id*., at para 6 thereof.

11 *Id*., at para 7 thereof.

12 *Id*., at para 10 thereof.

13 *Id*., at para 11 thereof.

14 *Ibid*.

> is a known phenomenon in ordinary trial process. Witnesses are interposed, stood down and postponed for all sorts of practical reasons during large trials. Some of those reasons will have disappeared in the present situation—no one is going to be delayed by a cancelled flight anymore. **Difficulties with the internet can, I think, be added to the list of reasons why witnesses get shuffled around**.' (Emphasis added).

8.3. The next technological issues relied on for the objection were the '*freezing*' of images on computer screens and the fact that some participants might '*drop out*' of or from the video conference altogether. Referring back to the court's recent experience with a trial conducted over a virtual problem, the judge acknowledged that such problems were present from time to time and that although they were '… *aggravating … they were tolerable*.'[15] The court further stated that it would be more sensible to confront this type of issue as and when it arises and further indicated that this could be achieved by latitude being granted to practitioners to deal with other issues in the course of the proceedings in the meantime.[16]

(b) Physical separation of legal teams:

9. Turning to the second rubric - *physical separation of legal teams* – the court commenced dealing with this by pointing to the real difficulty, raised by Ford's senior counsel, of the practitioners not all being together in one place for the trial. The court stated that the common practice was for people sitting behind counsel to convey useful and sometimes critical information to senior counsel (*via* junior counsel), as well as junior counsel frequently being able to assist senior counsel '*on the storm-tossed seas*'.[17] In this regard the court held that:

9.1. Although the ability to communicate in the above customary manner is '*certainly degraded*' when all members of the legal team and the litigant's representatives are in their own respective homes, their isolation from each other could be overcome by them using WhatsApp and other instant messaging platforms;[18]

9.2. While there is a difficulty of document sharing over such an instant platform, and accepting that this is a quo situation, it did not mean that the trial would inevitably be '*unfair or unjust*'.[19]

(c) Expert witnesses:

10. As far as the third rubric - *expert witnesses* – is concerned, the court acknowledged that the best way is for counsel to confer with expert witnesses in person and that this process can take days; it further accepted doing this on a virtual platform will be slower, more tedious and more expensive, but rejected the notion that it would result in a process that is unfair or unjust.[20] In relation to the difficulty of expert witnesses not being able to '*hot tub*' with the aim of conferring personally to prepare a joint report, or to give their evidence concurrently, the court stated that it did not see this as an insurmountable problem, because the expert witnesses could confer beforehand on virtual platforms.[21] It further stated that the '… *idea of two witnesses being examined at the same time in a virtual platform is no doubt challenging but, again, I do not think it cannot be attempted or that it will be unfair or unjust*'.[22]

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15 *Id*., at para 12 thereof.

16 *Ibid*.

17 *Id*., at para 13 thereof.

18 *Ibid*.

19 *Ibid*.

20 *Id*., at para 14 thereof.

21 *Id*., at para 15 thereof.

22 *Ibid*.

(d) Lay witnesses, and in particular their cross-examination:

11. Concerning the fourth rubric - *lay witnesses, and in particular their cross-examination* – the court dealt with a host of issues. In sequence, they were:

11.1 *First*, the possibility that, because such lay witnesses would be located remotely in their homes, someone could be coaching or suggesting answers to them. The court stated that its impression was that this would not be an acute problem as the action instituted was a class action and not a fraud trial.[23] It also concluded that it was improbable that the putative coacher would be willing to risk life and limb in positioning himself in the same room, but off-camera, as the witness during the pandemic;[24]

11.2 *Second*, the court dealt with the possibility of a witness not having access to a computer or otherwise not knowing how to use it adequately. Acknowledging that this would be a real problem, the court stated that it would prefer to deal with the problem once it presents itself in tangible form. The court appeared to incline to the position that some solution to this type of problem might have been found by the time the trial commences in two months' time;[25]

11.3 *Third*, accepting that there was a stand-off between Capic and Ford about the actual number of witnesses the former would call and the latter would have to cross-examine, the court stated that it would proceed on the basis that:[26]

> *'*… neither side will blink and that all 50 *__[witnesses]__ will be called. I do not see that this raises any special issues in the context of a virtual trial. The matter is Future issues listed *__[to endure]__ for six weeks. In some cases, large numbers of witnesses are called. This may be one of them*'* (*Insertions added);

11.4 *Fourth*, the unacceptability of witnesses being cross-examined over video-link. The court accepted Ford's submission that many authorities underscore the unsatisfactory nature of cross-examination by video-link, but pointed out such statements were not made in the present Covid-19 climate and that they had also not been made with the benefit of having seen cross-examination being conducted on virtual platforms such as *Microsoft Teams*, *Zoom* and *Cisco Webex*. The court then proceeded as follows:[27]

> *'*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.*'*

(e) Document management:

12. As far as the fifth rubric - *document management* – is concerned, the court rejected Ford's submission that document management in a virtual courtroom will be that much more

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23 *Id*., at para 16 thereof.

24 *Ibid*.

25 *Id*., at para 17 thereof.

26 *Id*., at para 18 thereof.

27 *Id*., at para 19 thereof.

difficult.[28] In relation to this issue the court stated that:[29]

> 'The problem of witness and cross-examination bundles is readily soluble with a service such as Dropbox. I have conducted a trial this way already. **It is not ideal, but I do not think this *[sic - *will*] result in an unfair or unjust trial. Further, the use of a third party operator may carry with it enhanced document management procedures**.' (Emphasis and *insertion added).

(f) Future issues:

13. The sixth rubric - *future issues* - mentioned in Ford's submissions related to the possibility of one of the practitioners or witnesses falling ill or having to take care of someone else, who might be ill, or having to supervise children while being involved in a virtual trial. The court acknowledged that such problems could arise, but it pointed out that they could be addressed in a sensitive manner by making due allowance for them should they arise. It added that it did not think that such problems are insurmountable although they could be challenging.[30]

(g) Trial length and expense:

14. The last and seventh rubric – *trial length and expense* – concerned Ford's objection that the trial undertaken in a virtual environment would prolong the hearing and thereby increase its expense. Given that Ford had ceased production at the time – according to counsel's statement from the bar – the court acknowledged that Ford's position had been made more complex by the pandemic.[31] In considering the ramifications of a prolonged trial, the court stated that if it could be sure that the crisis would have passed by October 2020, it would have had no hesitation in adjourning all the trials it was seized with for a period of six months and then commencing the trial allocations afresh. But, since there was no certainty how long the pandemic would last, it considered that it was not feasible nor consistent with the overarching interests of justice to do so.[32] Taking account of (i) the period that the trial had already been pending and the possibility of injustice occurring if it were to be adjourned for an indeterminate period,[33] as well as of (ii) the unsatisfactory mode of trial being imposed on a party against its will,[34] the court, in the final instance, concluded that since the circumstances were not ordinary, it was obligated to try its best '… *to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try*.'[35] In consequence, it refused Ford's application for an adjournment of the trial.[36]

15. The court directed the parties to confer about how the trial might be conducted (including which platforms might be used to host the hearing, how documents are to be exchanged, and how experts will confer prior to the trial) and to revert to it for further case management.[37]

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28 *Id*., at para 20 thereof.

29 *Ibid*.

30 *Id*., at para 21 thereof.

31 *Id*., at para 22 thereof.

32 *Id*., at para 23 thereof.

33 *Id*., at para 24 thereof.

34 *Id*., at para 25 thereof.

35 *Ibid*.

36 *Id*., at para 26 thereof.

37 *Id*., at para 27 thereof, as well as paragraph 1 of the court order at the commencement of the case report.

Editor's overview and comments:

There undoubtedly will be some persons who consider that the court's approach in this case might have been a tad too robust. Personally, I do not think that any such criticism is justifiable. The judge (Perram, J) was acutely aware of the limitations a virtual hearing would bring to bear on the ordinary trial processes, but believed that he was at least compelled to try and make a virtual hearing work in view of his overall commitment of ensuring an expeditious trial – and if a virtual hearing then proved to be unworkable he indicated that the matter might well have to be adjourned for a later hearing.

Moreover, since challenges always serve as a motivation to improve, the ingenuity of the developers of virtual platforms such as *Microsoft Teams*, *Zoom* and *Cisco's Webex* should *not* be underestimated in this regard. They constantly provide newer and improved versions of their software, produce '*bug fixes*' to existing versions and, therefore, any problems currently experienced with the use of these platforms, may soon be yesterday's problem.

Given that the Association of Arbitrators' *Rules for the Conduct of Arbitrations: 2018 Edition (1 January 2018)*-in Article 17.1 thereof (see footnote 8 above)–provide that: '*The arbitral tribunal, in exercising its discretion, shall* ***conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties'*** (Emphasis added), there is no reason why arbitrators and adjudicators should shun the use of such virtual platforms in appropriate cases. The one difficulty alluded to by the court in paragraph 11.1 above, namely that of a witness being coached during, e.g. cross-examination, can easily be countered by setting up cameras and audio devices in such a manner that it would obviate or mitigate this risk, *alternatively* by appointing an independent invigilator to ensure that the risk is eliminated.

After all, as Prof David Butler remarked some twenty-six years ago,[38] formal procedures and an inactive role for and by the arbitrator result in the loss of what was identified as potentially the greatest advantage of arbitration compared to litigation, namely its procedural flexibility.

Eric Dunn, SC

29 June 2020

[38] David Butler, **Expediting Commercial Arbitration Proceedings: Recent Trends**, 6 S. Afr. Mercantile L.J. 251 (1994) at p. 255.