Briefcase, Bundle and Now Passport: The Taking of Evidence Overseas by High Court Judges

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Introduction

What should happen if a witness is unable to attend court in person to give evidence? One increasingly common solution to this problem is for the witness to give evidence via a video link, which the Courts have the power to allow under CPR 32.3.[1] The increased use of video link technology in the Courts is partly explained by technological improvements and the fact that video technology is now used as a matter of course in day-to-day interactions following the pandemic. Nevertheless, an in-person examination is the gold standard, and in certain cases the Courts will require this to occur regardless of the costs of doing so.

Gorbachev v Guriev [2024] EWHC 247 (Comm) is one of those cases. Pelling J appointed himself as a "*special examiner*" to travel to Dubai to take the evidence of two of the defendant's witnesses who were unable to travel to England. Pelling J stressed that his decision was "*wholly exceptional*", an observation which is highlighted by the fact that just a few months earlier a similar application was rejected in *Skatteforvaltningen v Solo Capital Partners LLP* [2024] EWHC 19 (Comm) ("*SKAT*"). Pelling J's decision in *Gorbachev v Guriev*, particularly when considered alongside the contrasting decision in *SKAT*, is therefore a helpful illustration of the limits of the Courts' willingness for evidence to be taken via video link. It is also a useful reminder of the various options available in English litigation where a witness is unable to attend court in person.

[1] Although where the witness intends to give evidence from a foreign country the English court will only permit evidence to be provided by video link if it is satisfied that this approach is legally permissible under the laws of the country where the witness is based. For a recent example see: *Interdigital Technology Corp v Lenovo Group Ltd* [2021] EWHC 255 (Pat).

Key Background Facts

The application in *Gorbachev v Guriev* occurred in the context of legal proceedings concerning a dispute regarding the operation of two Cypriot trusts. The Defendant was a wealthy Russian businessman who, along with his son, had been sanctioned by the UK government pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019 (the "Regulations"). As a consequence, both the Defendant and his son were "*designated persons*" under the Regulations and were therefore prohibited from travelling to England. This posed a problem as both the Defendant and his son wished to provide evidence at the trial, and the Claimant wished to cross-examine them.

The Defendant and the Claimant therefore made a joint application for an order that Pelling J appoint himself as a special examiner and travel to Dubai along with counsel for both parties so that the witnesses could give evidence in person.

The Three Key Issues: Jurisdiction, Public Policy and Discretion

Under CPR 34.13(4) the High Court has the power to appoint a "*special examiner*" to attend a foreign country to take evidence from a person located in that country (provided that this is permissible under the laws of that foreign country).[2] In deciding whether to grant the application, Pelling J considered three issues:

- First, whether a High Court judge has jurisdiction to appoint himself or herself as a special examiner.
- Secondly, whether the reason why the Defendant and his son were unable to give evidence in England (because of sanctions under the Regulations) meant that "*there was a public policy point to be derived from the Regulations that precluded* [the Court] *from making the order sought*".
- Finally, whether "*as a matter of discretion*" the judge should exercise his power to appoint himself as a special examiner.

Issue 1: Whether a High Court Judge Can Appoint Himself or Herself as a Special Examiner

Although it was unusual that Pelling J had been asked to appoint himself (rather than a third party) as the special examiner, this was not unprecedented. Two decades ago in

[2] Where the laws of that foreign country do not permit a special examiner alternative approaches include asking the relevant judicial authority in that country to take the witness's evidence itself.

Peer International Corporation v Termidor Music Publishers Ltd [2005] EWHC 1048 it was established that a High Court judge's powers under CPR 34.13(4) included the power to appoint himself or herself as the special examiner. However, this orthodoxy had been called into question by Mr Justice Andrew Baker's decision in *SKAT*, which on one interpretation included a holding that a High Court Judge does not have the power to appoint himself or herself as a special examiner.

After performing "*a close reading*" of *SKAT*, Pelling J concluded that in that case Justice Baker had proceeded on the basis that he did have jurisdiction to appoint himself as a special examiner. *SKAT* was therefore a case where a High Court judge had simply declined to exercise his power to appoint himself as a special examiner; it was not a case where the judge had concluded that he did not have this power at all.

Issue 2: Do the Regulations Give Rise to Public Policy Reasons Preventing the Appointment of a Special Examiner in Litigation Involving Designated Persons?

The purpose of levying economic sanctions under the Regulations is to restrict a designated person's ability to participate in the UK economy, thereby incentivising that individual (and/or their country of citizenship) from engaging in certain activities (such as war). The question Pelling J had to consider is whether an associated (and implicit) public policy objective that could be derived from the Regulations is to deprive designated persons of the ability to participate in English litigation.

Pelling J noted that the Regulations included various provisions designed to enable designated persons to engage in English litigation. For example, the Regulations enabled HM Treasury to grant licences to enable a designated person to access frozen assets in order to fund their defence in English litigation (as had occurred in relation to the defendant). Pelling J therefore concluded that the Regulations did not include an implicit public policy objective of preventing designated persons from participating in English litigation.

Additionally, Pelling J noted that even if the Regulations did have an implicit public policy objective of preventing designated persons from participating in English litigation, "*its impact would require to be balanced against the well-established strong public interest in permitting a defendant … to properly defend those proceedings*." In other words, a clear and express statement of legislative intent would be needed to override the fundamental right of access to the court system.

Issue 3: When and How High Court Judges Should Exercise Their Discretion to Appoint Themselves as a Special Examiner

Pelling J agreed with Andrew Baker's observation in *SKAT* that deciding whether to take evidence by video link or through a special examiner was not a choice "*between a sub-optimal and an optimal solution*" but rather "*two sub-optimal assessments*":

- On the one hand, video link is an inferior method of taking evidence than an in-person examination (albeit Pelling J noted that following recent technological advances the use of a video link was becoming a more tenable option).

- On the other hand, where a trial judge appoints himself or herself as a special examiner to take evidence overseas, the costs and delay of this process will usually be considerable. Additionally, while a trial judge is performing the role of a special examiner, he or she will be unable to exercise the powers normally available to them during the evidence process, such as preventing inappropriate questions from being asked or answered and compelling a reticent witness to answer questions.

With the above factors in mind, Pelling J noted that: "*In most cases in the modern era it is highly likely that the balance will favour evidence being given by video link on cost and convenience grounds*." However, in this "*wholly exceptional*" case, Pelling J decided to issue an order appointing himself as a special examiner to travel to Dubai and take the witnesses' evidence in person (with the cost of his travel and accommodation expenses to be paid by the defendant). This was primarily for four reasons:

- The two witnesses had limited English-speaking ability and would need to give evidence via translators. This is a highly difficult process even when evidence is given in person, but it is even more complicated when witnesses are giving evidence via video link.

- This particular case was not a conventional commercial claim where ample documentary evidence was available. Instead, the core allegation was that there had been an oral declaration of trust, meaning that the "*witness testimony is ultimately the main or perhaps the sole basis for establishing, or failing to establish, what happened.*" In other words, the oral evidence would be of paramount importance, and any defects in the process of obtaining oral evidence could have grave repercussions.

- As the Defendant was a foreign national being sued in England against his will, it would be particularly unfair to impose on him a method of giving evidence that would place him at a potential disadvantage.

- Both parties had supported the application.

Pelling J was aware that Justice Baker had reached the opposite conclusion in *SKAT*. While both cases involved unopposed applications for the trial judge to appoint himself as a special examiner to take evidence from a witness located in Dubai, there were two fundamental differences: (i) the language difficulties faced by the witnesses (in *SKAT* the witnesses could speak English); and (ii) the lack of documentary evidence (in *SKAT* there existed much more documentary evidence).

Commentary

This outcome highlights a crucial point for any party to litigation where an overseas-based witness is unable to travel to England to give evidence. While the taking of evidence by video link will usually be the solution to this problem, in-person examinations are nonetheless viewed as the superior method of taking evidence, and the Courts will insist on this in certain circumstances. Modern technology may be here to stay in the Courts, but it has not fully displaced the old ways.

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