FEDERAL COURT OF AUSTRALIA

Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Second Adjournment) [2020] FCA 987

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| File number: | NSD 1283 of 2017 |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 13 July 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – second application by Respondents to adjourn trial – where virtual trial proposed in circumstances of COVID-19 pandemic – where six of Respondents’ witnesses located in China – where Chinese law submitted by Respondents to prevent witnesses giving evidence by video link – where Applicant proposes witnesses travel to Macau to give evidence – where Respondents request adjournment due to heightened risk of travel during pandemic, isolation requirements and potential inability and unwillingness of witnesses to travel – whether application premature |
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| Legislation: | *Evidence Act 1995* (Cth) ss 63, 64, Dictionary Pt 2 cl 4*Federal Court Rules 2011* (Cth) rr 1.33, 1.34, 29.09*Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*. Opened for signature 18 March 1970. 847 UNTS 231 (entered into force 7 October 1972)  |
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| Cases cited: | *Browne v Dunn* (1893) 6 R 67 *Commonwealth v McLean* (1996) 41 NSWLR 389*Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732*Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 |
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| Date of hearing: | 9 July 2020 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 35 |
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| Counsel for the Applicant: | Mr C A Moore SC with Mr A R Lang |
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| Solicitor for the Applicant: | Herbert Smith Freehills |
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| Counsel for the Respondents: | Mr C Dimitriadis SC with Mr C Burgess and Mr J Cooke |
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| Solicitor for the Respondents: | Shelston IP Lawyers |

ORDERS

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|  | NSD 1283 of 2017 |
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| BETWEEN: | MOTOROLA SOLUTIONS, INC.Applicant |
| AND: | HYTERA COMMUNICATIONS CORPORATION LTDFirst RespondentHYTERA COMMUNICATIONS (AUSTRALIA) PTY LTD ACN 165 879 701Second Respondent |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 13 JULY 2020 |

THE COURT ORDERS THAT:

1. The Respondents’ interlocutory application dated 2 July 2020 to vacate the hearing scheduled on 27 July 2020 be dismissed.
2. The Respondents’ pay the Applicant’s costs of the application to adjourn as taxed, agreed or assessed.
3. The matter be listed for case management on 14 July 2020 at 4.00 pm.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

1. The Respondents (‘Hytera’) apply for an adjournment of the part heard trial of this proceeding which is due to re-commence on Monday 27 July 2020 and to run for four weeks until Friday 21 August 2020.
2. Hytera has indicated that it proposes to call a number of witnesses at trial. Since this trial is proceeding by affidavit this means that it will not be necessary for Hytera orally to examine its witnesses in chief and it will instead be permitted to read their affidavits. However, the Applicant (‘Motorola’) is entitled to notify Hytera that it requires some or all of its witnesses to attend the trial and be cross-examined: the *Federal Court Rules 2011* (Cth) (‘FCR’) r 29.09(1). Unless those witnesses attend to be cross-examined then Hytera will not be permitted to rely upon their affidavits: FCR r 29.09(3).
3. Motorola has notified Hytera under FCR r 29.09(1) that it requires a number of its witnesses to be present at trial for cross-examination. Six of these witnesses are lay witnesses who live in mainland China. It is not in dispute that Hytera is not obliged to convey these witnesses to Australia for the trial. This is because the trial is to be conducted by means of an online videoconferencing platform.
4. Hytera nevertheless submits that the trial cannot proceed and should be adjourned. It submits, and Motorola is prepared to accept for the sake of argument, that it is contrary to Chinese law for this Court to take evidence from these witnesses by such means whilst they are located in mainland China. Hytera led evidence to this effect and whilst that evidence may be contestable there is no practical mechanism by which this Court would be able to secure obedience to its interpretation of Chinese law in China. In practical terms, it would appear that the only way that evidence could be taken from Hytera’s witnesses in China is if Hytera applied to this Court to make a request of the Chinese authorities under the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*. Opened for signature 18 March 1970. 847 UNTS 231 (entered into force 7 October 1972) (‘the Hague Convention’).
5. Hytera’s position has, therefore, been that the trial cannot proceed because a number of its witnesses will not be able to be cross-examined. I acceded to this view on 23 April 2020 when I adjourned, on its application, the trial dates which had been fixed for 4 May 2020. At that time, there was no evidence that the witnesses could travel to another intermediate jurisdiction such as Hong Kong or Macau to give their evidence. Hong Kong was referred to in argument but only as an option which might perhaps bear fruit.
6. However, shortly after that adjournment it became apparent that the option of travelling to Hong Kong had firmed. On 5 May 2020, on the basis that this was worth exploring, I again fixed the case for a resumed hearing on 27 July 2020. Hytera opposed the setting of fresh dates for the resumed trial. Since 5 May 2020 the parties have been monitoring the situation in Hong Kong and, more latterly, in Macau. I fixed the matter for further trial on the clear understanding that if it became apparent that the trial could not practically proceed it would again be adjourned. Since then Hong Kong has retreated as a viable solution.
7. Hytera has at this stage not requested this Court to arrange for the making of a request to the Chinese authorities under the Hague Convention to permit the cross-examination of its witnesses to take place by means of a videoconferencing platform in China. Its evidence was that this process could take up to a year and was not guaranteed success.
8. In any event, it became apparent from around 24 June 2020 that it is in principle possible for Hytera to convey the six of its witnesses who live in mainland China to Macau and there for them to be cross-examined by means of an online videoconferencing platform.
9. Hytera now seeks to resist that option. It points to a number of difficulties that may presently lie in the path of doing so. Hytera will need to apply for business visas for the witnesses which may be refused because the authorities may take the view that their presence in Macau is not for business purposes. They will be placed in quarantine for 14 days on their return to the mainland. In the case of one witness who needs on his return to travel through two provinces will be obliged on his return to quarantine for 14 days in Guangdong, then for 7 days in Harbin followed by 14 days of quarantine at home. This means his life will be significantly disrupted for 35 days. In addition to these hardships, it appears that the witnesses will be required to undertake tests for COVID-19. Further, one of the witnesses has a child and she will not able to care for the child whilst in quarantine. Hytera also notes that the Chinese (and Australian) authorities recommend against cross-border travel and that there is a heightened risk of contracting COVID-19 while travelling. Whilst the witnesses will travel in private cars they will nevertheless have to stand in an immigration queue for up to half an hour at the Zhuhai border control exit facility and at the Macau entry facility. They will be carried by car to their hotel in Macau where they will have to rely on room service and otherwise not leave the hotel. Similar difficulties will arise on the return trip. The witness who lives in Harbin will need to take a five hour flight either to Guangdong or Zhuhai with the attendant risks involved in that activity.
10. Hytera submits that it is not reasonable to require it to put its witnesses through these hardships and to expose them to an increased risk of COVID-19. Indeed, Hytera submitted that presently two of its witnesses are unwilling to travel to Macau to give evidence.
11. I do not consider that putting the argument that way states the legal issue which arises correctly. No one is requiring Hytera to do anything. It is Hytera which wishes to call the witnesses and which therefore bears the burden under FCR r 29.09(3) of making them available for cross-examination. It will either succeed in the endeavour of making the six witnesses available for cross-examination or it will not. Neither Motorola nor this Court are involved in that process.
12. The actual legal question, which has not yet arisen and may never arise, is whether Hytera in the event that it is unable to bring one or more of the six witnesses to Macau for cross-examination, will be entitled nevertheless to rely upon their affidavits. That question will not arise until the point in the trial at which Hytera seeks to read the affidavits and it is at that point in the trial that it will be known whether the witnesses have made it to Macau or not.
13. If one or more of them have not made it to Macau there will then ensue a debate as to whether the trial should be adjourned or whether Hytera may then nevertheless be permitted to rely on the affidavits notwithstanding that the witnesses will not be cross-examined.
14. At that point, and not before, it will be appropriate to consider Hytera’s submission that it would be unfair to it to proceed without the six witnesses being cross-examined. Its argument to this effect was as follows: if the trial proceeded without the witnesses being cross-examined the Court would be deprived of the opportunity for its witnesses to impress the Court with their mien under questioning. For example, whilst doubts might initially appear about a witness’s evidence by reference to other evidence (such as documents or the evidence of other witnesses), the cross-examination of the witness might show the witness to be reliable and therefore to resolve favourably to Hytera any doubts which might otherwise exist.
15. The cross-examination of a witness can sometimes leave the witness’s testimony enhanced rather than damaged. Usually this results from unskilled cross-examination, the risk of which I rate as exceptionally low in this litigation. I recognised on Hytera’s last adjournment application that the loss of this opportunity was nevertheless a valid species of prejudice: *Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd (Adjournment)* [2020] FCA 539 at [8]-[10].
16. However, there is no reason that Hytera cannot make this submission at trial. If, at that time, it is apparent that its inability to present its witnesses for trial means that it suffers this prejudice, then it may renew the adjournment application at that time. Postponing that debate until then has other instrumental advantages. The Court will know whether it is dealing with a problem concerning only two witnesses or whether it involves six or, indeed, whether the problem has disappeared altogether. The number of witnesses who are involved and the nature of their evidence is a relevant matter for a consideration of Hytera’s prejudice.
17. Further, by the time that Hytera seeks to rely on the affidavits, the issues in the trial will be clearer. In particular, the Court will have had the advantage of having had Hytera’s counsel explain the significance of these witnesses. It is true, as its counsel submitted, that it may not necessarily address their significance in its opening address. But even if it did not explain this in its opening submissions, Hytera would be bound to explain their significance at the time it submitted that the trial should be adjourned because of this particular species of prejudice.
18. For that reason, it would be safer to assess Hytera’s submissions about this issue at trial in an environment of full information about actual problems rather than in the present environment of imperfect information about apprehended problems.
19. If one or more of the six witnesses do not travel to Macau and Hytera seeks to rely upon their evidence and if the prejudice argument just discussed is rejected then a question will arise for Hytera as to how it will then proceed. The following steps will be available to it in respect of each witness who does not travel:
20. it may choose to proceed without relying on the witness’s evidence.
21. if it wishes to use the witness’s affidavit notwithstanding its inability to produce the witness for cross-examination, then it may choose to apply under FCR r 1.34 for a dispensation from the operation of FCR r 29.09(3). Here the application would be premised on the proposition that Hytera had tried to secure the attendance of the witness and should therefore be entitled to rely on the witness’s evidence notwithstanding that the evidence will not be tested under cross-examination. What standard should be applied on such an application is not presently clear but it would rise, one would think, at least so high as to require that Hytera should have taken all reasonable steps to secure witness’s travel to Macau. This will require a precise and thorough examination of the impediments said to exist, the significance of that part of the witness’s evidence to which Motorola’s cross-examination is to be directed and a balancing, at that time, of the various considerations which then actually exist.
22. if (2) fails, Hytera may instead seek to tender the affidavit of the witness as a hearsay document on the basis that the maker of the representations contained in the document is ‘available’ to give evidence. This may be permissible under the *Evidence Act 1995* (Cth) (‘the Evidence Act’) s 63. Whether it is permissible will turn on whether the relevant witness can be said at the time Hytera seeks to read the affidavit to be ‘available’ within the meaning of Pt 2 cl 4 of the Dictionary to the Evidence Act. This in turn would appear likely to turn upon whether Hytera has taken ‘all reasonable steps’ to compel the witness to travel to Macau: cl 4(1)(g). As in (2), this will require precise focus on what the then existing impediments actually are.
23. if (3) fails, Hytera may then to seek to tender the affidavit of the witness under s 64 of the Evidence Act on the basis that the witness is available for the purposes of s 63 but that it would cause undue expense or undue delay or it would not be reasonably practicable for the witness to travel to Macau. This is likely to invite an analysis of the impediments to travel and the significance of the witness’s evidence.
24. There is no doubt that were Hytera successful under (3) or (4) it would be open to Motorola to submit that the Court ought not to accept the hearsay evidence because it was inconsistent with other evidence before the Court: *Commonwealth v McLean* (1996) 41 NSWLR 389 (‘*McLean*’) at 401-402.
25. There is an unsolved but engaging procedural question as to whether, were Hytera to succeed under (2), the rule in *Browne v Dunn* (1893) 6 R 67 (‘*Browne v Dunn*’) would prevent Motorola from submitting that the witness’s evidence should not be accepted because it is inconsistent with other evidence before the Court. One view would be that Motorola could not have failed to have put the matter to the witness because Hytera had successfully applied to remove Motorola’s right to cross-examine. It may be that the situation is governed by *McLean*.
26. Another view might be that the question could be altogether avoided by imposing as a condition on any dispensation from FCR r 29.09(3) a requirement that Hytera not submit that any significance should attach to Motorola’s inability to cross-examine the witness: FCR r 1.33. There is a certain symmetry in requiring a party who has successfully applied to be relieved of the burden of having its witness cross-examined being, at the same time, required to surrender as the price for that indulgence its procedural entitlement to comment on the failure of the opposing party to cross-examine the witness.
27. None of this needs to be determined at the moment. It will only arise if (a) there are witnesses who do not travel to Macau that Hytera still wishes to call; and, (b) its initial prejudice argument fails. If that comes to pass then these issues will arise.
28. Depending on the quality of its evidence as to why the witnesses have not been made available for cross-examination in Macau – a matter in Hytera’s hands – it may fail to obtain a dispensation under FCR r 29.09(3) or to be permitted to tender the affidavits under s 63 and s 64. In that event, it may renew its adjournment application. That may be a difficult application given the circumstances which would need to obtain for each of those forensic manoeuvres to have failed. However, that too is a question which does not presently arise.
29. The present application wrongly characterises the burdens with which Hytera may be confronted as being the result of a refusal of any adjournment application. This is not correct. The burdens are generated by Hytera’s desire to call as witnesses persons who it may not be able to convey to Macau. Facility exists under FCR r 1.34 and s 63 and s 64 of the Evidence Act to deal with that eventuality at trial. Hytera is not to be exempted from the precise focus those provisions will require on the actual reasons a witness is not available by pursuing an adjournment application built on the shifting sands of apprehension.
30. For example, I would find it useful to know whether the witnesses did not travel to Macau because their business visa applications were refused or because they had simply refused to travel. It is less useful to be told that the visa applications may be refused because travelling to Macau to give evidence for their employer may not be business travel or that, at the moment, some of the witnesses do not wish to travel although they do not say they will not travel.
31. Hytera also relied upon a comment I made in the previous adjournment about the risk of a mistrial if the Court were to leave to the trial the question of whether Motorola would be entitled to submit that the witness’s evidence should not be accepted even if they were not cross-examined. At the time of those remarks, the identities of the witnesses were not flagged with the Court and the problem was discussed at a level which did not include any consideration of the relevant parts of the FCR or the Evidence Act*.*.
32. The landscape has now shifted and it not apparent that the problem under discussion will necessarily arise. The time to assess the risk of a mistrial will be at the moment this problem becomes apparent during the trial. If Hytera is right the trial will be adjourned at that point.
33. Hytera relied upon the reasons of Robb J in *Haiye Developments Pty Ltd v Commercial Business Centre Pty Ltd* [2020] NSWSC 732 (‘*Haiye*’) at [38]-[39]. In that case, his Honour adjourned a trial involving witnesses in China. The question he was examining was whether the witnesses should be required to travel to Australia. The question in this case is whether they should be required to travel by car to Macau (and in one case to travel internally by plane). Hytera has not led any specific evidence about what the risks of COVID-19 would be to these witnesses travelling in private cars to Macau or even about the risk of flying from Harbin to Guangdong. Its evidence on COVID-19 was addressed at a level of generality detached from the conditions the witnesses would actually face. All I know about the situation in Macau is there has been a small number of confirmed cases, around 4,000 suspected cases, that the Chinese authorities are not preventing movement between China and Macau, that there is some talk of developing a travel bubble between Macau and Guangdong and that the Chinese authorities do not recommend travel unless there are ‘special needs’.
34. The Evidence Act and the FCR envisage the inability of a party to produce a witness for cross-examination. There may well be good reason in some cases to bring forward into an adjournment application a consideration of the issues which those provisions engender but in other cases it may be useful to wait and see how many of the problems actually transpire to be more than chimerical. *Haiye* may be seen as lying on one side of the line. This case lies on the other. Indeed, at [82] Robb J acknowledged that the outcome of an adjournment application during the pandemic ‘[depends] on its own facts’. There is a real risk in considering the availability of witnesses in light of the present pandemic in a prospective way (as one does on an adjournment application) that parties will seek to take advantage of the pandemic to secure adjournments which would not otherwise be available. In my view, it is much safer to deal with real world problems rather than apprehended concerns. In *Haiye* Robb J found that the circumstances before him fell into an ‘exceptional category’. It is my view that I do not yet have sufficient information before me to determine that this matter falls into such a category.
35. Another significant matter I also take into account is that if the difficulties which Hytera apprehends may arise do in fact arise and the trial has to be adjourned again, what will then be adjourned is a much more manageable segment consisting solely of the evidence of six lay witnesses. It will be much easier to schedule the taking of their evidence under the Hague Convention than it will be to try and reschedule the whole hearing and to fit that process – notoriously cumbersome – into the adjourned trial. Put another way, even if Hytera were now correct in its concerns there is no reason why the rest of the trial cannot be dealt with. There is no reason not to allow the parties to open the resumed hearing, for Motorola’s witnesses to be cross-examined and for the extensive expert evidence to be dealt with. The cross-examination of these six witnesses is in effect a stub at the end of the case. I see no reason for the tail to wag the dog.
36. This situation can be contrasted with that before Robb J in *Haiye* where the plaintiff was bringing an adjournment application and it was the availability of the plaintiff’s witnesses’ which was in issue. Robb J noted that it would not be proper for the Court to ‘risk the plaintiff’s case failing because of the absence of crucial witnesses’: [39]. As I have outlined above the fact that the trial can proceed with Motorola’s witnesses and the experts indicates that Hytera’s witnesses are not ‘crucial’ in the same way. And, when the time arrives if their absence creates real prejudice for Hytera the question of adjournment may be looked at afresh.
37. In terms of the conduct of any future adjournment application, it would not presently be my inclination to permit Hytera to rely upon evidence about its various efforts to get the witnesses to Macau which could not itself be tested by cross-examination. In practical terms, this may mean its evidence on these efforts may need to be gathered by persons who are themselves willing to be conveyed to Macau. Of course, circumstances may change and this is not a definitive statement, merely an indication that I propose to be astute to ensure that Hytera’s efforts to get the witnesses to Macau can be fairly scrutinised by Motorola. In that regard, Motorola made many criticisms of Hytera’s evidence on the present application some of which may be well-founded; in particular, much of the evidence is pitched at an unacceptably vague and general level.
38. It would also be useful on any such future application to receive an application from Hytera for the making of a request under the Hague Convention together with any other positive and concrete suggestions it has to make about the problems at hand. This may include how it proposes to further that application and the steps it has taken to date to advance that procedure. To this stage, Hytera has been able to make extensive criticisms of the efforts made by Motorola to permit Hytera’s evidence to be given in the circumstances of the pandemic.
39. The adjournment application will be dismissed with costs. There will be a case management hearing tomorrow 14 July 2020 at 4 pm to discuss the further preparation of the trial.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram . |

Associate:

Dated: 13 July 2020