

# Video link evidence and foreign government consent

*Joyce v Sunland Waterfront (BVI) Ltd* [2011] FCAFC 95; (2011) 195 FCR 213

Where the Federal Court proposes to take evidence of a witness in a foreign country by video link, the court's discretion is not hampered by any need to consider questions of sovereignty or comity between nations, such as whether the foreign government consents, at least absent any law of the foreign country forbidding the procedure. That was the conclusion of the full court of the Federal Court (Keane CJ, Dowsett and Greenwood JJ) in *Joyce v Sunland Waterfront (BVI) Ltd*.<sup>1</sup> The court overturned the decision of the primary judge (Logan J), who had declined to permit evidence by video link where the foreign government indicated it did not consent.<sup>2</sup>

## The facts

In proceedings in the Federal Court, the applicants claimed damages for misleading or deceptive conduct and deceit against a number of respondents. The claim concerned land in Dubai in the United Arab Emirates (the UAE) forming part of a development called 'The Dubai Waterfront'. In essence, the claim was that the respondents misrepresented that the purchase of the land had to be negotiated through certain of the respondents. The applicants had paid a 'consultancy fee' equivalent to over AUD13 million allegedly on the strength of the misrepresentations.<sup>3</sup>

One of the respondents, and a necessary witness in the proceedings, was an Australian citizen, Mr Joyce. He had been the managing director of the Dubai developer. He wished to give evidence in the Australian proceedings. However, at the time those proceedings were commenced, he had been charged with criminal offences in the UAE concerning the same transaction. He was granted bail but surrendered his passport and his bail conditions prevented him from travelling to Australia to participate in the Australian proceedings.

Attempts were made to arrange a mechanism by which Mr Joyce's evidence could be taken in the UAE by the primary judge or by video link to Australia. The evidence before the court was that no UAE law prohibited either procedure. The court enlisted the assistance of the Department of Foreign Affairs and Trade (DFAT) to communicate with the UAE Government about the situation and the applicants' solicitors also made inquiries.

Initially the UAE government had no objection to the primary judge's travelling to the UAE and taking

evidence 'on commission' and orders were made to that effect.<sup>4</sup> However, the UAE Government subsequently stated that it did not consent to this course. In these circumstances, the primary judge vacated the orders concerning receipt of evidence in the UAE, dismissed motions concerning the taking of evidence by video link, adjourned the trial and stayed the proceedings.

## Decision of the full court

The full court overturned the primary judge's decision.

The parties accepted that, given the attitude of the UAE government, it was not practicable for a judge, examiner or commissioner to visit Dubai for the purpose of taking evidence and that the only option was that evidence be taken by video link. The Federal Court is empowered to take evidence by video link by s 47A(1) of the *Federal Court of Australia Act 1976* (Cth).

The primary judge had considered that taking evidence by video link would be an assertion of Australian judicial power on the territory of the UAE. He referred to previous first instance decisions to the effect that it would be a breach of the UAE's sovereignty to do so without its consent.<sup>5</sup> He said that those concepts were given content in relation to the exercise of judicial power by the notion of 'comity', noting that in *CSR Ltd v Cigna Insurance Australia Ltd*<sup>6</sup> a majority of the High Court had approved the following explanation by the Supreme Court of the United States in *Hilton v Guyot*:<sup>7</sup>

'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

The full court rejected the primary judge's conclusions.

The court observed that the definition of 'comity' in *Hilton v Guyot* concerned recognition by one nation *within its own territory* of the sovereign acts of another nation, and that it contemplated the possibility of derogation from this recognition by a nation's domestic laws. The court also noted recent statements in the High Court<sup>8</sup> and Federal Court<sup>9</sup> sceptical of the usefulness of the concept of comity in the context of judicial power.

The court noted that 47A did not in terms require a foreign state's consent and concluded that it overrode any obligation of comity which Australia may have had in that regard. The court saw 'no justification for imposing upon the exercise of the discretion conferred by s 47A, a requirement that the other state consent to the taking of evidence in that way.'<sup>10</sup>

The court accepted that 'if the law of a foreign state prohibits a person within its borders from participating in such a process, then problems might arise'.<sup>11</sup> But there was no evidence that this was so here. The court considered that, in the absence of such a prohibition, even if the government of the UAE opposed evidence being taken by video link, where such evidence was voluntarily given, that did not impinge upon state sovereignty:<sup>12</sup>

[T]he rules relating to sovereignty and comity do not limit individual rights and freedom of individual citizens. Provided that the law of the relevant nation does not forbid it, an Australian citizen, whilst present in a foreign country, may speak on the telephone to somebody in Australia, be it his or her mother, lawyer or, we suggest, a court sitting to determine a matter in accordance with the law of Australia. The concepts of sovereignty and comity focus upon the relationship between states, not the relationship between an individual citizen and a state, whether it be that of which he or she is a citizen or another.

The court accepted that to take evidence in a foreign country in person without permission was an infringement of sovereignty. The court therefore endorsed the practice of approaching DFAT where a court proposes to take evidence in foreign country in person, with a view to obtaining the foreign government's consent. On the other hand, the court said that, whether, when a judge proposed to take evidence from a witness in another country by video link, DFAT should be involved was a matter for the judge: there might be cases where aspects of foreign law or foreign relations make that desirable but it would generally not be necessary.

### Implications and observations

The full court's approach is consistent with perhaps a less deferential and even sceptical approach to questions of comity and foreign relations in recent years. In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,<sup>13</sup> the full court granted leave to serve originating process in Japan on a Japanese

company alleged to have killed whales in the Australian Whale Sanctuary adjacent to the Australian Antarctic Territory. The primary judge had refused leave because, among other things, the proceeding might upset the diplomatic status quo under the Antarctic Treaty and be contrary to Australia's interests connected with its claim to sovereignty to the Australian Antarctic Territory. In *Habib v The Commonwealth*,<sup>14</sup> the full court permitted the continuation of a claim against the Commonwealth for complicity in alleged acts of torture committed on the applicant by officials of the governments of Pakistan, Egypt and the United States. The court held that the claim was not precluded by the act of state doctrine and that that doctrine cannot, consistently with the Constitution, preclude an action against the Commonwealth based upon an allegation that the Commonwealth has exceeded its executive or legislative power.<sup>15</sup>

The approach of the full court to s 47A may be compared with that in England under the Civil Procedure Rules. There, in case of doubt, the party arranging video link evidence is required to make enquiries with the Foreign and Commonwealth Office 'with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at a diplomatic level'.<sup>16</sup>

While the reasons of the full court directly concerned s 47A of the Federal Court Act, that provision has analogues in other jurisdictions, including New South Wales.<sup>17</sup> It seems likely that those provisions will be approached in the same way as the full court approached s 47A, at least at first instance. This approach is one reason why it may be more attractive to take the evidence of a person overseas by video link than in person.

Having said this, there are conflicting views among trial judges as to the degree to which evidence by video link is a satisfactory substitute for evidence given in person.<sup>18</sup> Further, there is a practical difficulty with taking the evidence of witnesses overseas by video link, or indeed on commission or examination by a person appointed by an Australian court: the process depends on the witness's willingness to participate, as the witness cannot in practice be compelled to answer questions.<sup>19</sup> The only way in which to overcome this problem is to enlist the aid of the foreign country's courts via a letter of request.<sup>20</sup>

By Perry Herzfeld

## Endnotes

1. [2011] FCAFC 95.
2. *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 9)* [2011] FCA 832.
3. *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 2)* (2010) 267 ALR 46 at [1]–[4] per Logan J (FCA).
4. See *Foreign Evidence Act 1994* (Cth), s 7; *Federal Court Rules* (Cth), O 24 r 1 (now see *Federal Court Rules 2011* (Cth), Div 29.2).
5. *Yamouchi v Kishimoto* (2002) 12 NTLR 32 at [16] per Thomas J (NTSC); *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2004) 208 ALR 491 at [118] per Owen J (WASC).
6. (1997) 189 CLR 345 at 394–396 per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.
7. (1895) 159 US 113 at 163–164.
8. *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [90] per Gummow and Hayne JJ: ‘comity is ‘either meaningless or misleading’; it is ‘a matter for sovereigns, not for judges required to decide a case according to the rights of the parties.’
9. *Habib v The Commonwealth* (2010) 183 FCR 62 at [37] per Perram J (FC): ‘No doubt comity between the nations is a fine and proper thing but it provides no basis whatsoever for this Court declining to exercise the jurisdiction conferred on it by parliament.’
10. [2011] FCAFC 95 at [60].
11. [2011] FCAFC 95 at [61].
12. [2011] FCAFC 95 at [63].
13. (2006) 154 FCR 425.
14. (2010) 183 FCR 62.
15. Perram J said that a previous full court decision, *Petrotimor Companhia de Petroleos SARL v The Commonwealth* (2003) 126 FCR 354, which treated the act of state doctrine as going to whether there was a ‘matter’ within the meaning of the Constitution, was plainly wrong. He also said in *dicta* that the *Moçambique* rule (that an Australian court will not determine ownership of foreign land) would be similarly inconsistent with the Constitution in relation to a claim which asserted that the Commonwealth had exceeded its legislative or executive power.
16. ‘Practice Direction 32 — Evidence’, Annexure 3 at [4], available at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/menus/rules.htm>.
17. *Evidence (Audio and Audio Visual Links) Act 1998* (NSW), ss 5B, 5D. See also, e.g., *Evidence (Miscellaneous Provisions) Act 1958* (Vic), ss 42E.
18. See, e.g., *Australian Medical Imaging Pty Ltd v Marconi Medical Systems Australia Pty Ltd* (2001) 53 NSWLR 1; *Australian Securities and Investments Commission v Rich* (2004) 49 ACSR 578 (NSWSC); *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* (2009) 181 FCR 152; *Corrigan v Commvault Systems (Australia) Pty Ltd* (2011) 192 FCR 71.
19. The full court adverted to this difficulty: [2011] FCAFC 95 at [65].
20. See *Foreign Evidence Act 1994* (Cth), s 7(1)(c) and State equivalents, e.g., *Evidence On Commission Act 1995* (NSW), s 6(1)(c); *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 9B(1)(c). See generally *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd* (1987) 14 FCR 461; *Director of Public Prosecutions v Alexander* (1994) 33 NSWLR 482 at 486 per Hunt CJ at CL.



[www.simonfieldhouse.org](http://www.simonfieldhouse.org)