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Litigation — Remote Hearings and Trials

In light of the COVID-19 pandemic, the Malaysian judiciary is adopting new measures to simultaneously ensure that public health and safety remains protected and that the public's constitutional right of access to justice is not prejudiced.

Under the recent Standard Operating Procedures,¹ the judiciary encourages the use of video conferencing or other electronic means of communications to conduct hearings. This would dispense with the need for the parties and their respective counsel to be physically present in court. Under the new initiative, a number of hearings (including in the Court of Appeal²) have been disposed of remotely.

While remote hearings are generally not an issue when litigants or their counsel are agreeable to it, difficulties may arise when such hearings have not been agreed upon by the parties. Does the court have jurisdiction to order a hearing or a trial be conducted via video conferencing, notwithstanding a party's objection?

The issue was discussed by the High Court in the recent case of *SS Precast*.³ Three applications in chambers were disposed of by Justice Wong Kian Kheong through the use of video conferencing during the Movement Control Order. The judge held that in cases where a party to the suit objects to a hearing by video conference, the court nevertheless has the power to conduct such hearing via video conferencing, in the interest of justice. The judge was of the view that the court's failure to exercise such power may lead to injustice and a denial of the litigant's (or in this case, the applicant's) fundamental right of access to justice which is guaranteed under the Federal Constitution.

¹ "The Judiciary's Standard Operating Procedures (SOP) During the COVID-19 Pandemic" (dated 11 May 2020) <<http://www.kehakiman.gov.my/en/node/2919>>

² Khairah N Karim, "Court of Appeal Goes Virtual for the First Time" *New Straits Times* (23 April 2020) <<https://www.nst.com.my/news/crime-courts/2020/04/586873/court-appeal-goes-virtual-first-time-nsttv>>

³ *SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors* [2020] MLJU 400

This case helps to clarify the position in situations where the use of video conferencing in hearings is objected to by a litigant. However, *SS Precast* was a case concerning applications in chambers. Whether the court will adopt the same stance in trials, where witnesses' independence and impartiality become an issue, remains a question mark.

In UK, the courts may allow “witnesses to give evidence via video link or other means” in cases where the use of such electronic means would result in the efficient, fair and economic disposal of the litigation.⁴ Similarly, in Singapore, the Evidence Act allows evidence to be given through video conference, with the leave of court, in cases where the witness is outside the territory of Singapore, or if it is in the interest of justice.⁵ While our Courts of Judicature Act 1964 and Evidence Act 1950 do not contain express provisions on the use of video conferencing or other electronic means to dispose of cases remotely, there seems to be no reason why our courts should adopt a different approach from those jurisdictions. Several prominent legal practitioners have proposed amendments to our laws in order to clarify the present legal position and reflect the current global scenario.⁶ While there is a need to ensure public health and safety, the public's fundamental right of access to justice should not be prejudiced.

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⁴ Civil Procedural Rules, CPR r 32.3; *Polanski v Conde Nast Publications Ltd* [2005] UKHL 10 (HL)

⁵ Evidence Act 1950, s 62A

⁶ A Sreenevasan, N Navaratnam, Lim Chee Wee, R Hadri, G Sreenevasan, B Navin Siva et al., “Remote Hearing Protocol: Practices and Procedures” (29 April 2020)