BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV2007/0248
BETWEEN:

LIU HAO CHENG

Claimant

and

(1) CHANG HUA-MONG
(2) TI YUEH-YIN
(3) STAR ASIA WORLDWIDE LIMITED
(4) ATC TRUSTEES (BVI) LIMITED

Defendants

Appearances: Mrs Hazel-ann Hannaway-Boreland with Mr Mirza Manraj for the first and second Defendants/Applicants and Mr Richard Evans with Ms Monique Peters for the Claimant/Respondent

JUDGMENT in CHAMBERS

[2010: 26 February; 2 March]

(Adjournment – medical evidence – nature of adjournment – evidence by video link)

[1] **Bannister J [ag]:** I have to deal with an application dated 25 February 2010 by the first and second Defendants in these proceedings for an adjournment of some two weeks from Friday 26 February 2010 so that the state of heath of the second Defendant may be further checked in order to establish whether I should order a further adjournment.

[2] The application is made towards the end of the trial of these proceedings. I must set out certain pleaded facts in order to demonstrate the background against which I have to decide it. The Claimant claims to be the beneficial owner of the third Defendant company ('Star Asia') (which is not represented before me) and of an apartment in Hong Kong which is registered there in its name. Star Asia is registered in the BVI. There is no dispute that the first and second Defendants were the original and remain the only registered directors and members of Star Asia. The

Claimant's case is that they held both their shares and their office as nominees for the Claimant. This the first and second Defendants deny. The Claimant also claims that prior to the acquisition of the apartment by Star Asia the first and second Defendants executed declarations of trust over and blank transfers of their shares in Star Asia and delivered undated resignations as its directors. With some exceptions, these latter facts are disputed and in any event their effect is denied. Alternatively, the Claimant says that he provided the entirety of the funds with which the apartment was purchased and claims that in any event Star Asia holds it on resulting trust for the Claimant.

[3] The witnesses are the Claimant, the first and second Defendants, and their daughter, Kuo-Ling Chang, who has been referred to throughout the proceedings as 'Tiffany'. I hope that she will take no offence if I adopt that convenient way of referring to her in this judgment. The Claimant is resident in Hong Kong, where he works as a partner in Goldman Sachs. He speaks impeccable English with great fluency. The first and second Defendants live in California. The first Defendant is aged 84 and clearly suffers from some of the frailties which advanced years bring. The second Defendant, his wife, is 61. Neither speaks much English and their evidence has been given through an interpreter of Mandarin Chinese. For a short period in 2005 and 2006 the Claimant was married to Tiffany. Tiffany lives with her parents in California. She speaks good English and did not require the assistance of an interpreter. She has two young children, one being the daughter she bore to the Claimant in June 2005 and an older child borne within a previous relationship. I am not sure that the exact age of this child was ever established, but it was made clear (and not challenged) that he was below an age at which he was capable of managing alone by himself without day to day adult assistance and attendance.

[4] The claim form was issued on 1 October 2007 and the trial was eventually fixed to begin on 1 February 2010 with an estimate of three days. On 21 January 2010 I heard an application by the first and second Defendants to strike out the amended statement of claim and in the alternative for permission to adduce expert evidence. I dismissed the former application but acceded to the second, which involved adjourning the start of the trial to 16 February 2010.

[5] Having pre-read the papers over the weekend of 13/14 February 2010 I formed the opinion that the acute conflicts of fact raised by the pleadings and to which the witness statements condescended required that the witnesses should give their evidence in the witness box in chief rather than by swearing to the truth of their written statements. I had other matter to deal with on the morning of 15 February 2010 but at 2 pm I called Counsel to Chambers to inform them of this case management decision so that they would not be taken by surprise when the trial opened. Neither Counsel raised any objection. In particular, no indication was given by Mrs Hannaway-Boreland, who was to appear for the first and second Defendants, that this would cause any difficulties with travel arrangements or with the interpreter who was going to be required by the first and second Defendants.

[6] Sensibly, neither Counsel sought to make any opening submissions when the trial opened on 16 February 2010 but certain procedural matters occupied the Court until 10.45, when the Claimant

proceeded to give his evidence in chief. This was concluded by 12.50, when the short adjournment was taken. Mrs Hannaway-Boreland opened her cross examination at 1.30 pm and concluded it at 3.40, when the first Defendant was called. He was still giving his evidence in chief through the interpreter, Mr Peng, when I rose at about 4.40 to attend to another matter. When the trial resumed at 10 am on Wednesday 17 February 2010, the first Defendant continued with his evidence in chief, which was concluded by about 10.30. He was then cross examined by Mr Evans, for the Claimant, and answered some questions in re-examination, finishing at about 12.10 pm. The second Defendant was then called and gave her evidence in chief through Mr Peng. At about 4.00, Mr Evans began his cross examination. When I rose to adjourn at 4.30, Mrs Hannaway-Boreland mentioned that the services of Mr Peng had only been engaged for two days and that it would be necessary to make arrangements for him to stay into the following day. No indication was given by Mr Peng that that would be an impossibility for him and Mr Evans has told the Court that in brief discussions between the parties after I rose no suggestion was made that Mr Peng could not be available on the following day. Mrs Hannaway-Boreland, who I need not say has acted impeccably throughout and who has advanced her Clients' case with a tenacity which does her credit, does not suggest that this was an inaccurate description of what had taken place.

[7] When I sat again at 10.00 on Thursday 18 February 2010 it transpired that Mr Peng had in fact left for the airport the previous evening at about 5.30. I was told that he had other commitments which made his further attendance at Court impossible. I find it quite astonishing that if that was indeed the case neither he nor either of the first and second Defendants had made this clear when the question of rearranging his schedule was raised in open Court by their Counsel on the evening of Wednesday 17 February. Even if that was due to confusion of some sort, I find it equally astonishing that if that was only later understood to be the case, no attempt was made to get a message to me about that state of affairs until the sitting resumed on the morning of Thursday 18th.

[8] Met with this *fait accompli*, I adjourned for a short time so that means of arranging for a substitute interpreter could be explored. I specifically asked Mrs Hannaway-Boreland whether her Clients had given instructions that no efforts were to be made to find a replacement interpreter and she told me that those were not her instructions. The subsequent lack of any reported forward progress in this matter made it clear, however, that the first and second Defendants had absolutely no intention of engaging in any efforts in order to enlist the services of an alternative, either for the Friday to come or for the following week. Indeed, the first and second Defendants, in making an application to have the remainder of the second Defendant's cross examination carried out through video link, positively relied on the fact that they were unable to remain in Tortola after the morning of Friday 19 February. I find as a fact that the second Defendant's absence from Court after I rose on Thursday 18 February was a matter of deliberate choice on her part. That is not to say that they may not have had good reasons for that choice from their own domestic perspective, but the decision to return to California on 19 February 2010 rather than engage in efforts to complete the second Defendant's evidence on Friday 19 February or early in the following week was made to suit their own convenience.

[9] It became apparent by 11.00 or thereabouts on the morning of Thursday 18 February that no efforts were being made to find a substitute interpreter. It was then conveyed to me that the first and second Defendants were not prepared to use the services of any interpreter other than Mr Peng – thus neatly ruling out any possibility of resuming the second Defendant's cross examination in anything like the near future. I therefore decided to take Tiffany's evidence next. At that point, the objection was taken that the family was due to leave Tortola on a flight which would not permit her evidence to continue into Friday 19 February 2010. At my urging, alternative flights were arranged which would permit Tiffany to continue in the witness box until 10 am on Friday 19. I therefore sat at 8.30 am on that day and thanks to the professional skills of Counsel, her examination and cross examination were completed shortly after 10.

[10] Mrs Hannaway-Boreland then applied for the remainder of the second Defendant's cross examination (and any re-examination) to be carried out by video-link with California at some date in the future. She said that both the first and second Defendants suffered from what she described as serious health problems. Some material was produced relating to the state of health of the first Defendant and opining that he was unfit to travel, but that was of little relevance given the fact (a) that he had travelled here from California and was about to travel back and (2) that his evidence was completed. As for the health of the second Defendant, a page of medical notes was shown to me which clearly referred to the second Defendant, but without any indication when they were made or what was their full implication. There was no suggestion that the second Defendant was unable, on health grounds, to travel. Mrs Hannaway-Boreland said that quite apart from the absence of Mr Peng, the party had had to return to California on Friday because the first Defendant had no medication with him to cover him for any longer period and because Tiffany's elder child was with a child minder who either could or would not provide care for any longer. Since the parents are for practical purposes monoglot, they could not be left alone on Tortola without their daughter's assistance. Any further visits to complete the second Defendant's evidence would therefore require their daughter to accompany her, which would involve further child care difficulties. It was not stated that there were no family members other than Tiffany able to provide this service. All of this material, which Mrs Hannaway-Borelend told the Court on instructions, only reinforced the impression that any apparent willingness of the first and second Defendants to arrange for alternative translating services had been, to use an overworked word, disingenuous. The Defendants had decided all along that they were not going to make themselves available after Thursday 18 February.

[11] The application to continue the second Defendant's evidence by video link was opposed by Mr Evans.

[12] As I have said, it was not suggested and there was certainly no evidence that a return to the jurisdiction to complete her evidence would put the second Defendant's health at risk. I therefore decided that the second Defendant should resume her evidence on Thursday 25 February 2010, while giving her the alternative of declining to do so and relying merely on the evidence given to date, subject to any submission the Claimant might make as to the weight which should be

accorded to it. I gave my reasons orally. I later moved the date of the adjourned hearing to Friday 26 February 2010, in order allow sufficient time for notice to be given to the Claimant that it would not be necessary for him to arrange to fly from Hong Kong should the second Defendant decide not to return to continue her evidence.

[13] On the afternoon of Tuesday 23 February 2010 Mrs Hannaway-Boreland informed Conyers Dill & Pearman, for the Claimant, that the second Defendant would not be returning to give evidence. On 25 February 2010 the first and second Defendants issued this application asking that these proceedings 'be adjourned for a mention to facilitate the fixture of the final trial date(s)'. The grounds for the application are that the second Defendant 'suffers from serious health problems' and that 'it is the recommendation of a medical physician that the second Defendant be placed on rest and observation prior to further travel or legal proceedings'.

[14] The application is supported by an affidavit from the second Defendant. In it she states that Mr Peng told the first and second Defendants that he was unable to stay beyond Thursday 18 February because he had another translation engagement in the US and she exhibits a 'confirmation' in the form of a letter from the agency, Continental Interpreting, which includes the statement that Mr Peng 'had other scheduled engagements immediately after his assignment for 16 and 17 February in Tortola'. The second Defendant states that the rearrangement of the return travel arrangements cost the first and second Defendants an additional US$1,832. She says that she suffers from high blood pressure and coronary heart disease and says that she had surgical procedures for her condition in Taipei on 20 April 2009. It would appear that her condition did not prevent her from travelling from California to Taipei for that purpose, although of course that was now some ten months ago and it is possible that she had been in Taipei for some time before the operation in any event. The second Defendant exhibits the document handed to the Court on 19 February 2010 in support of the application for her evidence to be continued by video link, which, it now turns out, relates to those procedures. She says, and there is no reason to doubt it, that the return flight to California on Friday 19 February 2010 was delayed and stressful and that she was at home resting in bed with dizziness and rapid heart beat until she went for medical attention on Monday 22 February 2010, when she was prescribed medication. . She produces the results of blood pressure and pulse readings taken on 22 and 23 February 2010. In the absence of accompanying expert medical evidence it is not possible for me to take any view about the significance of the figures which they disclose and I refrain from doing so. At the visit of 23 February 2010 she saw her doctor, Jung-il Yang. She says that Dr Yang requested that she undergo a series of blood and urine tests, so that her condition may be further evaluated. Tests reveal that there is blood in the second Defendant's urine, which will require further analysis. She does, however, show that she has made inquiries about alternative translators. She asks that the trial be adjourned for a further two weeks so that the results of her tests can be mentioned and a date fixed for an adjourned trial on the basis of a full evaluation of her current state of health.

[15] The second Defendant exhibits to her affidavit a letter from Dr Yang. It is dated 23 February 2010, is addressed 'To whom it may concern' and its substance is in the following terms:

> 'This is to advise you that I am the physician for [the second Defendant] . . . she has been complaining about the situation of palpitations; the work up for that is in progress. For precaution, I advise her not to take oversea long trip for now.'

[16] Mrs Hannaway-Boreland submits that this evidence amounts to a material change of circumstances, such that it is open me to revisit my earlier decision refusing the request that the second Defendant's evidence be completed by video-link. I am not at all sure that that is right, but I am prepared to revisit that decision on the assumption that it is. In deciding whether to permit an adjournment to allow further evidence to be taken by video link, I have to attempt to do justice between both sides. I have to bear in mind that this will involve delay in the middle of trial and that that will mean that the Claimant, who has already been waiting since October 2007 for a decision in this matter, will have to wait even longer. I bear in mind the high authority to the effect that evidence given by video link is not to be considered as inherently inferior to evidence given in the witness box, but I must also take into account that this application is made at a late stage in the trial and in the middle of the evidence of the party wishing to continue her evidence by that means. I know of no case and have been referred to no authority in which this course has been taken, although I would accept that circumstances may well occur when that is the appropriate course to take even at such a stage in proceedings.. I am also concerned that if I were to direct that further evidence be taken in this manner, the arrangements for it would be in the hands of the Defendants alone. I could, of course, police it to a certain extent by making appropriate unless orders, but I have nevertheless to take into account that what I can only interpret as a reluctance on the part of the Defendants to complete their evidence gives rise, in my judgment, to a real risk that they will not make suitable arrangements with anything approaching expedition. Further, I have no confidence that the second Defendant's health will not again be advanced as a reason for postponing the completion of her evidence, whether by video link or otherwise. If, as I think they are, these concerns are justified, then there is a real risk that matters will simply drift until brought to an end by non-compliance with some unless order. The result if that happened would be that things will be in exactly the same position in which they are now, but after the lapse of yet further time and with the second Defendant's evidence still uncompleted.

[17] So that even if I were to revisit my earlier order on the assumption that there had been a change of circumstances, I would reach the same conclusion on the question of video evidence.

[18] Mrs Hannaway-Boreland reminds me that the hearing was listed for three days only. That is true, but that does not mean that the Defendants were exonerated from making any arrangements for contingencies. Indeed, Counsel have a continuing obligation to review time estimates and the Defendants should have been advised to make efforts to extend their arrangements as soon as it appeared possible that the three day estimate might be overrun. I do not accept that it would have been impossible for the first Defendant to obtain additional medication locally or that alternative arrangements could not have been put in place to arranger for further care for Tiffany's child had the matter been addressed in good time. All that was said about the child minder was that that

person declined to continue to look after the child after a certain point. No-one said that no other person was available to take over the care of the child.

[19] I have therefore to decide on the Defendant's application of 25 February 2010 whether to grant an adjournment as asked.

[20] In doing so, I have to bear in mind the overriding objective and in particular the requirement to deal with cases expeditiously and proportionately. I have also to balance the prejudice to the Claimant if his case is interrupted by a potential series of adjournments while the health of the second Defendant is monitored against the prejudice to the first and second Defendants if the second Defendant's evidence remains uncompleted. In balancing these concerns, I have to and do take into account that no court should make directions which, if they are to be complied with, threaten the health of a party or witness. I also have to take into account the Court's duty to manage cases efficiently, by which I mean seeing to it that they are decided with the minimum of delay and complexity so that the parties are given a decision as soon as that can be done consistently with the interests of justice.

[21] Bearing all these factors in mind have decided that I should not grant the adjournment sought, for the following reasons. It may be that the second Defendant's health has deteriorated since she flew to Tortola for the present hearing, but at this stage there is no medical evidence that, except by way of precaution, she should not fly here from California. More importantly, there is no medical evidence that the second Defendant's current symptoms will cease to affect her at any time in the near future. If it had been demonstrated that the second Defendant had a remediable condition from which she could be expected to make a sufficient recovery at some identifiable time in the future, I could see the force of granting an adjournment for a sufficient time to see if that prognosis was correct. But in this case, there is no suggestion that the second Defendant's condition is ever going to improve sufficiently for her to make the trip over here completely free of risk. For reasons similar to those expressed in paragraph [16] above, I am not prepared to stall these proceedings with no assurance that there will, or at least may come a time when the second Defendant will be able to take a part in them once more. It seems to me to be the height of injustice to the Claimant that his case should be kept in an indefinite limbo while the second Defendant's ability to return to Court is kept under periodic assessment with no indication that an improvement in her condition is on the horizon.

[22] It is true that if I refuse the adjournment, the first and second Defendants will suffer the potential prejudice of not having the second Defendant's evidence completed. Mr Evans for the Claimant does not press for the second Defendant to be compelled to return for her cross examination to be completed. What he objects to is yet another adjournment of these proceedings. I have already indicated that my preliminary view is that even if the second Defendant's evidence remains incomplete, I should not disregard the evidence she has given so far[1]. The question will (again,

[1] Compare **Polanski v Conde Nast Productions [2005] 1 WLR 637** at **644**

subject to submissions) be one of weight. Against this possible prejudice (which may turn out to be no prejudice at all), I have to balance the prejudice to the Claimant if I grant an adjournment in the terms sought and against the background which I have attempted to outline. It seems to me that it would be unjust and inconsistent with the overriding objective to defer judgment at such a late stage for the purpose of putting the trial into suspended animation for an indefinite and uncertain period. As a matter of good case management, I have to balance the potential prejudice to the second Defendant with the prejudice to the Claimant of leaving the questions which have to be decided in this case on hold. I am firmly of the view that that outweighs any potential prejudice to the first and second Defendants. They have given their evidence in chief and the first Defendant has been cross examined. Tiffany has completed all of her evidence. The circumstances under which the second Defendant was initially unable to complete her evidence were, to say the least, unsatisfactory and in my judgment the right case management decision is for me to dismiss this application.

Commercial Court Judge

2 March 2010